No. 93-644

In the Supreme Court of the United States

OCTOBER TERM, 1993

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HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC.,
Petitioners

v.

KARL L. OBERG,
Respondent

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF PETITIONERS

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QUESTION PRESENTED

Whether Oregon's denial of any judicial review of compensatory and punitive damages verdicts for excessiveness violates the Due Process Clause of the Fourteenth Amendment.

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v.

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On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of Oregon (Pet. App. 1a-71a) is reported at 316 Or. 263 and 851 P.2d 1084. The opinion of the Court of Appeals of Oregon (Pet. App. 72a-88a) is reported at 108 Or. App. 43 and 814 P.2d 517. The order of the Circuit Court for Multnomah County denying petitioners' post-trial motions (Pet. App. 89a-90a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Oregon was entered on May 20, 1993 (Pet. App. 1a), and a timely filed petition for reconsideration was denied on July 27, 1993 (Pet. App. 92a-93a). The petition for certiorari was filed on October 25, 1993, and was granted on January 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

1. This case involves a constitutional challenge to the State of Oregon's prohibition of judicial review, at both trial and appellate levels, of the amount of compensatory and punitive damages awarded by jury verdicts. Prior to 1910, trial and appellate courts in Oregon — like federal courts and courts in all other states — were "empowered to set aside a verdict and grant a new trial for excessive damages found by a jury or to order a remittitur of the excess as a condition to overruling a motion for a new trial." Lusk, *Forty-Five Years of Article VII, Section 3, Constitution of Oregon*, 35 Or. L. Rev. 1, 4 (1955). See, *e.g.*, *Adcock* v. *Oregon R.R.*, 77 P. 78, 79, 80 (Or. 1904); *Serles* v. *Serles*, 57 P. 634, 635 (Or. 1899). In that year, however, Article VII, Section 3 of the Oregon Constitution was amended to provide that "[i]n actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict."

This amendment worked a "drastic abridgment" of the power of the Oregon courts to grant new trials. Lusk, *supra*, 35 Or. L. Rev. at 3. While Article VII, Section 3 permits a court to overturn a verdict when there is *no* evidence supporting the jury's finding of *liability*, the Oregon Supreme Court has interpreted the amendment to "eliminate, as an incident of jury trial in this state, the common-law power of a trial court to re-examine the evidence and set aside a verdict because it was excessive or in any other respect opposed to the weight of the evidence." *Van Lom* v. *Schneiderman*, 210 P.2d 461, 465 (Or. 1949). This restriction — which is far greater than the limitation on the powers of the federal courts imposed by the Seventh Amendment (see *ibid.*) — precludes excessiveness review of both compensatory and punitive damages awards. *Id.* at 470. See also *Fowler* v. *Courtemanche*, 274 P.2d 258, 275 (Or. 1954). Thus, as the Oregon Supreme Court has explained, prior to the amendment Oregon courts were permitted to set aside awards that were "'palpably or outrageously excessive,'" that were "'unreasonable or outrageous,'" that were so large "'as to strike every one with [their] enormity and injustice,'" or that "'no twelve men could reasonably have given'" (*Van Lom*, 210 P.2d at 464 (citations omitted)); after the amendment, Oregon courts had no power to disturb such awards. See *ibid.* In short, Article VII, Section 3 worked "the removal from the judges of th[e] power to correct a miscarriage of justice by ordering a new trial." *Id.* at 471.

2. In this case, respondent Karl Oberg was injured after a three-wheeled all-terrain vehicle manufactured and sold by petitioners (collectively "Honda")[1] overturned while he was attempting to climb a steep embankment. He subsequently brought suit against Honda, demanding $19,390.39 in special damages (his medical expenses), $900,000 in compensatory

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[1] A complete listing of Honda Motor Co., Ltd.'s, subsidiaries is set forth at Pet. App. 94a-97a.

general damages (principally for pain and suffering), and $5 million in punitive damages. The case was tried to a jury. At trial, evidence was placed before the jury establishing that Honda's net worth was some $4.9 billion, and at closing argument plaintiff's counsel told the jury:

> There's a very good reason why you were told, and this is an undisputed fact, that Honda has a net worth of 4.9 billion, yes, with a B, dollars. Our request to you is that you order Honda to pay one-tenth of one percent of their net worth in punitive damages, and that is $4.9 million.

Tr. 2838.

At the close of trial, the judge instructed the jury as follows regarding the amount of punitive damages it could award:

> If you decide [that the defendants acted with disregard for the rights of others] you may award punitive damages, although you are not required to do so, because punitive damages are discretionary.
>
> In the exercise of that discretion, you shall consider evidence, if any, of the following:
>
> First, the likelihood at the time of the sale [of the ATV] that serious harm would arise from defendants' misconduct.
>
> Number two, the degree of defendants' awareness of that likelihood.
>
> Number three, the duration of the misconduct.
>
> Number four, the attitude and conduct of the defendant[s] upon notice of the alleged condition of the vehicle.
>
> Number five, the financial condition of the defendant[s].

> And the amount of punitive damages may not exceed the sum of $5 million.

Pet. App. 23a n.11.[2]

By a vote of 11-1, the jury awarded plaintiff the $919,390.39 in compensatory damages and $5 million in punitive damages sought in the complaint. Because the jury found Oberg 20% at fault, the trial court reduced the compensatory award to $735,512.31 pursuant to Oregon's comparative negligence statute.

Honda then filed motions for a new trial and for judgment notwithstanding the verdict contending, among other things, that both the compensatory and the punitive verdicts were excessive. Honda argued that the $900,000 award for

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[2] The $5 million limit conformed to the amount sought by the plaintiff in his complaint. Under Oregon law, "the amount of damage alleged in the complaint does fix a maximum limit, and [the jury is] not permitted to award plaintiff more than that amount." Tr. 2941 (jury instructions). As for general compensatory damages, the court instructed the jury that "[t]he law does not furnish you with any fixed standard by which to measure the exact amount of general damages. The law does require that all compensation allowed be reasonable. You must apply your own considered judgment to determine the amount." Tr. 2942. The court added that in calculating general damages the jury should consider "all past physical and mental pain and suffering," "all future physical and mental pain and suffering," "the extent to which plaintiff's injuries will impair his ability to work and perform labor in the future," "any interference with plaintiff's normal and usual activities," and "the amount of future medical treatment" likely to be sought by the plaintiff. The court concluded that the general damages award could not exceed the $900,000 sought in the plaintiff's complaint. Tr. 2942. Finally, the jury was instructed that special damages include "[t]he reasonable value of medical care and services furnished in the treatment of plaintiff. The amount may not exceed the sum of $19,390.39." Tr. 2943.

non-economic injuries was insupportably high because it was more than 46 times the size of Oberg's special damages and because the interest alone on that award would yield more than four times the amount of general damages suggested by Oberg's counsel during closing argument.[3] In support of its contention that the compensatory award was excessive, Honda also cited cases from other jurisdictions drastically cutting compensatory awards under similar circumstances.[4]

Honda also attacked the $5 million punitive judgment as grossly excessive. Honda pointed out that (1) it was held liable for strict liability design defect and negligent failure to warn, not some more aggravated type of misconduct; (2) it was subject to numerous other lawsuits seeking large compensatory and punitive judgments for precisely the same

[3] Oberg's counsel suggested that an award of $50 per day – $18,300 per year – for the rest of Oberg's life would be an appropriate measure of his pain and suffering. If $900,000 were invested at the statutory rate of 9%, it would yield $81,000 per year – more than four times the amount Oberg's counsel suggested as reasonable – without invading the principal. Even if invested at the current 30-year treasury bond rate of approximately 6%, Oberg's judgment would yield $54,000 per year – roughly three times the amount his counsel suggested as reasonable.

[4] *E.g.*, *Thornton* v. *Montefiore Hosp.*, 469 N.Y.S.2d 979 (Sup. Ct. 1983) (ordering remittitur of award for pain and suffering from $1 million to $500,000; award for future medical expenses from $1 million to $34,480; and award for future lost earnings from $500,00 to $350,000), modified, 473 N.Y.S.2d 758 (App. Div. 1984) (ordering further remittitur of pain and suffering award to $400,000 and lost earnings award to $50,000); *Illey* v. *Hatley*, 693 S.W.2d 506, 512 (Tex. Ct. App. 1985) (suggesting remittitur of $1 million award to $174,000), writ ref'd n.r.e. (Dec. 11, 1985). For a more recent example, see *Sears, Roebuck & Co.* v. *Harris*, No. 1911519, 1993 WL 341147, at *15-*16 (Ala. Sept. 10, 1993) (ordering $5.5 million award reduced to $850,001).

design and warnings; (3) the punitive damages were more than 258 times Oberg's economic damages; (4) the $5 million penalty surpassed every other punitive award reflected in reported decisions of the Oregon courts; and (5) the punitive award was 50 times the size of the maximum fine for criminal assault (the most closely analogous crime under Oregon law).

The trial court denied Honda's motions without comment. Pet. App. 89a-90a.

3. The Oregon Court of Appeals affirmed the judgment. Pet. App. 72a-88a. Although the court reviewed all of Honda's other objections, it declined to entertain Honda's challenge to the size of the punitive verdict, concluding that the Oregon Constitution, as construed by the Oregon Supreme Court in *Van Lom*, prohibits both trial and appellate courts from setting aside a damages award on the ground that it is excessive. *Id.* at 86a-87a. In so ruling, the court rejected Honda's contention that the Due Process Clause of the Fourteenth Amendment requires judicial review of the size of punitive exactions challenged as excessive. *Id.* at 80a-87a. The court did not expressly address Honda's companion challenge to the size of the compensatory verdict, presumably concluding that its holding regarding punitive damages disposed of the issue as to compensatory damages as well.

The Oregon Supreme Court affirmed. Pet. App. 1a-71a. It noted that as interpreted in *Van Lom*, Article VII, Section 3 of the state constitution "restricts the power of Oregon trial and appellate courts to conduct [an excessiveness] review." *Id.* at 13a-14a & n.7. The court then stated: "We do not interpret [*Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991)] to hold that an award of punitive damages, to comport with the requirements of the Due Process Clause, always must be subject to a form of post-verdict or appellate review that includes the possibility of remittitur." *Id.* at 25a. Instead, the court found it dispositive that the *jury* was

instructed on the considerations relevant to an award of punitive damages, reasoning that "initial application of the constitutionally sufficient objective criteria [by the jury] * * * rather than post-hoc application of those criteria, increases the protective effect of the criteria." *Id.* at 26a.[5] Like the intermediate appellate court, the state supreme court did not separately address Honda's challenge to the size of the compensatory award.

Justice Peterson dissented. Pet. App. 34a-60a. He concluded that due process requires both "'meaningful and adequate review [of the size of punitive exactions] by the trial court'" and appellate review to "'make[] certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.'" *Id.* at 60a (quoting *Haslip*, 499 U.S. at 20, 21).[6]

SUMMARY OF ARGUMENT

A. Oregon's denial of judicial excessiveness review must be regarded as presumptively unconstitutional because it is a radical and aberrant departure from long-settled Anglo-American practice. By the mid-eighteenth century English courts routinely set aside excessive damages awards returned by juries; the same approach was uniformly followed by state courts in this country prior to the ratification of the Fourteenth Amendment. Indeed, judicial review of damages verdicts is so well entrenched that, as far as we are aware, *all*

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[5] The court also observed that judges may review both the correctness of the jury instructions and the sufficiency of the evidence to support a finding of punitive liability. Pet. App. 26a-27a.

[6] On September 16, 1993, the judgment of the court below was stayed by Justice O'Connor pending disposition of the case by this Court. Pet. App. 91a.

states but Oregon permit both trial and appellate judges to set aside excessive awards. Given "the importance of history and widely shared practice as concrete indicators of what fundamental fairness and rationality require" (*Schad* v. *Arizona*, 111 S. Ct. 2491, 2501 (1991) (plurality opinion)), Oregon's decision to withhold a safeguard that has been regarded as fundamental in all other Anglo-American jurisdictions from time immemorial must be held to run afoul of the Due Process Clause.

B. The judgment of history is confirmed by application of the three-part test articulated in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), for determining the conformity of state procedures to the requirements of due process. *First*, given the amounts of money involved in punitive damages litigation (and, for that matter, in products liability litigation generally), the private interest at stake may be enormous. *Second*, the likelihood of an erroneous deprivation of property under the Oregon system is substantial: it is beyond dispute that juries often base their verdicts on extra-legal considerations and may be led astray by bias, by naked redistributionist impulses, by a misunderstanding of the law, or by many other influences or deficiencies that should be unaceptable in our system of justice. These concerns are compounded where punitive damages are at issue, for the setting of an appropriate penalty is wholly outside the experience of lay men and women. And as many Members of this Court have noted, the likelihood of error is greatly increased in cases (such as this one) where the jury is urged to consider the wealth of an out-of-state corporate defendant. This common-sense judgment is confirmed by empirical data, which demonstrate that juries often err in setting punitive awards. *Third*, the State's interest here is insubstantial, since the added cost of providing judicial excessiveness review would be minimal — as is demonstrated by the willingness of every other state to provide such review.

In nevertheless upholding Oregon's system, the court below found it dispositive that the jury was instructed as to the considerations that are relevant to a punitive award. But it is doubtful that any jury charge, no matter how detailed, could obviate the need for judicial excessiveness review. The empirical evidence is overwhelming that juries often do not understand instructions, and even a jury that does grasp the judge's charge may fall subject to passion, bias, arbitrariness, or simple misjudgment. Equally as important, the charge in this case — which gave the jury a brief list of relevant factors — did not serve as a meaningful and effective constraint on the jury's discretion: the jury was not told whether those factors were exclusive, was not instructed on how to weigh the considerations it was given or how to balance them against one another, and could not have been given expertise in assessing punishments.

C. There is no novelty in Honda's contention that judicial excessiveness review is constitutionally required. To the contrary, this Court's decisions in *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991), and *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), plainly were premised on the understanding that such review is mandated by the Due Process Clause. *Haslip* emphasized that judicial review of the size of damages awards is an essential component of the common law method of imposing punitive damages. And in *TXO*, every Member of the Court recognized, either implicitly or explicitly, that judicial excessiveness review is constitutionally required. The decision below cannot be reconciled with that principle.

ARGUMENT

"The Anglo-American jury is a remarkable political institution" that has been "with us for so long that any sense of surprise over its main characteristics has perhaps somewhat dulled." H. Kalven & H. Zeisel, *The American Jury* 3 (Phoenix ed. 1970). But whatever its virtues, it is plain that

"[t]he jury would never have won [its] popularity * * * if it had not been developed and controlled by the action of the courts." 1 W.S. Holdsworth, *A History of English Law* 321 (7th ed. 1956). Indeed, the history of the institution is in large part a chronicle of attempts to implement "some regular method of controlling the verdicts of juries," an endeavor that has been recognized as "essential to the proper working of the jury system." *Id.* at 346. As a consequence, the practice of providing judicial excessiveness review of damages verdicts returned by juries is deeply rooted in English and American law; such review is provided by courts in England, by the federal courts, and by courts in every jurisdiction in the United States (other than the one below).

Oregon's categorical renunciation of judicial excessiveness review is a radical and aberrant departure from this otherwise universal practice. The Oregon system places no check on juries that are led astray by misunderstanding of the law, by bias, by naked redistributionist impulses, or by the many other "stimuli which the judge will exclude." H. Kalven & H. Zeisel, *supra*, at 498. By the same token, Oregon entrusts unreviewable authority to jurors with no prior experience in the administration of punishment, who may be both impassioned by perceived misconduct on the part of an out-of-state (here, foreign-owned) corporation and bedazzled by evidence of the defendant's wealth. It therefore is no surprise, as a distinguished former justice of the court below has observed, that "juries in Oregon, as elsewhere, do occasionally return verdicts which violate the principles of justice." Lusk, *supra*, 35 Or. L. Rev. at 25. Oregon's denial of judicial excessiveness review makes the policing of such egregious errors impossible and accordingly cannot be squared with the "requirement of 'fundamental fairness'" expressed by the Fourteenth Amendment's Due Process Clause. *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18, 24 (1981).

A. Oregon's Total Denial Of Judicial Excessiveness Review Of Jury Verdicts Departs Dramatically From Deeply Ingrained Traditions Of Anglo-American Law.

1. This Court, "of course, [has] relied on history and 'widely shared practice' as a guide to determining whether a particular state practice so departs from an accepted norm as to be presumptively violative of due process." *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2720 (1993) (plurality opinion) (citation omitted). Here, that guide points clearly towards the unconstitutionality of the Oregon system: the practice of providing judicial review of the size of damages verdicts (whether punitive or compensatory) is deeply engrained and almost universally recognized in Anglo-American law.

As long ago as the mid-seventeenth century, English courts granted new trials in cases where juries returned verdicts against the weight of the evidence,[7] and the practice

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[7] See, *e.g.*, *Wood* v. *Gunston*, 82 Eng. Rep. 864, 867 (Upper Bench 1655); *Anon.*, 83 Eng. Rep. 775 (K.B. 1661); *Anon.*, 83 Eng. Rep. 1288 (K.B. 1665); *Duke of Richmond* v. *Wise*, 86 Eng. Rep. 86 (K.B. 1671). See generally 1 Holdsworth, *supra*, at 346. Even prior to that time it had been recognized that control of the jury was necessary, although judicial oversight of the jury took a different form before the mid-seventeenth century. In their original role, members of the jury functioned as witnesses as well as triers of fact; they were to reach a verdict on the basis of their personal knowledge of the transaction at issue. See *id.* at 333-334; Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 Am. J. Legal Hist. 201, 203-205 (1988). Formal judicial review of verdicts returned by such juries was logically impossible because the jurors were expected to consider information not available to the judge. Instead, courts relied to some degree on informal controls (such as telling a jury how to decide a case or requiring it to redeliberate when its verdict

was settled in all English courts by the mid-eighteenth century.[8] In particular, as Justice O'Connor demonstrated in

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seemed suspect) and on fining juries that reached verdicts against the weight of the evidence. See *id.* at 211 & nn. 62-63; Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263, 285-298 (1978). But during this period jury control was principally exercised through the attaint, which involved the convening of a 24-man jury that, when a doubtful verdict had been returned, would try the first jury for perjury. "This was only logical at a time when every jury spoke out of its own knowledge of the facts involved in the case. * * * If such jurymen returned a verdict which was demonstrably false, and in spite of their own better knowledge of the facts, then it was obvious that they had committed perjury and deserved the punishment provided for attainted juries" — imprisonment, confiscation of goods, and a declaration that "'they themselves forever thenceforward be esteemed in the eye of the law infamous.'" T.F.T. Plucknett, *A Concise History of the Common Law* 131 (5th ed. 1956) (citation omitted). See Mitnick, *supra*, 32 Am. J. Legal Hist. at 209-210. This cumbersome institution never worked well, however (in part because attaint juries themselves proved unreliable), and attaint fell into disfavor by the beginning of the seventeenth century, a time when petit jurors had ceased to function as witnesses. See Plucknett, *supra*, at 132-134; Mitnick, *supra*, 32 Am. J. Legal Hist. at 205-212. It was "[i]n response to the crisis of jury control caused by the decline of the attaint and the prohibition against fining [recalcitrant jurors], [that] the judges turned to the new trial as a remedy for an erroneous verdict in civil cases." *Id.* at 211-212 (citation omitted). See Plucknett, *supra*, at 135-136.

[8] See, *e.g.*, *R.* v. *Bewdley*, 24 Eng. Rep. 357, 359 (K.B. 1712); *Musgrave* v. *Nevinson*, 93 Eng. Rep. 715 (K.B. 1723); *Dormer* v. *Parkhurst*, 95 Eng. Rep. 414, 418 (K.B. 1738); *Berks* v. *Mason*, 96 Eng. Rep. 874, 874-875 (K.B. 1756); *Bright* v. *Eynon*, 97 Eng. Rep. 365, 366, 368 (K.B. 1757); *Norris* v. *Freeman*, 95 Eng. Rep. 921 (C.P. 1769); 3 W. Blackstone, *Commentaries on the Laws of England* 387 (1768). See generally T.F.T. Plucknett, *supra*, at 136 ("the work [of authorizing the order of new trials] was half done

TXO, "courts at common law in England traditionally would strike any [damages] award that appeared so grossly disproportionate as to evidence caprice, passion, or bias." 113 S. Ct. at 2729-2730 (O'Connor, J., dissenting) (footnote omitted). This power has been exercised at least since 1655 (see *Wood* v. *Gunston*, 82 Eng. Rep. 867 (Upper Bench)) and was so well settled by the middle part of the next century that Lord Mansfield — who "was no innovator in legal matters" (A.W.B. Simpson, *A History of the Common Law of Contract* 618 (1975)) — was led to comment that "there was no doubt but that the Court had the power of taking the opinion of a second jury in any case where the damages were excessive." *Ducker* v. *Wood*, 99 Eng. Rep. 1092 (K.B. 1786).[9] This was true in cases involving both compensatory and punitive awards. Indeed, the first English decision to discuss the doctrine of punitive damages itself recognized that "a new trial for excessive damages" could be awarded in "a glaring

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by 1700, and declared to be complete in 1757" in *Bright*); Mitnick, *supra*, 32 Am. J. Legal Hist. at 208-216.

[9] See, *e.g.*, *Townsend* v. *Hughes*, 86 Eng. Rep. 994, 997 (C.P. 1677); *Ash* v. *Ash*, 90 Eng. Rep. 526 (K.B. 1701); *Chambers* v. *Robinson*, 93 Eng. Rep. 787, 788 (K.B. 1726); *Gilbert* v. *Burtenshaw*, 98 Eng. Rep. 1059, 1060 (K.B. 1774); *Fabrigas* v. *Mostyn*, 96 Eng. Rep. 549 (K.B. 1774); *Leith* v. *Pope*, 96 Eng. Rep. 777, 778 (K.B. 1782); *Duberly* v. *Gunning*, 4 Durm. & E. 651, 657 (K.B. 1792). See also, *e.g.*, *Hewlett* v. *Cruchley*, 128 Eng. Rep. 696, 698 (C.P. 1813) ("it is now well acknowledged in all the courts of Westminster-hall, that whether in actions for criminal conversation, malicious prosecutions, words, or any other matter, if the damages are clearly too large, the Courts will send the inquiry to another jury"); D. Graham, *A Treatise on the Law of New Trials in Cases Civil and Criminal* 1127-1130 (2d ed. 1855). See generally *Browning-Ferris of Vermont Industries, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 272 (1989).

case * * * of outrageous damages." *Huckle* v. *Money*, 95 Eng. Rep. 768, 768-769 (K.B. 1763).

In this country as well, "[u]nder the traditional common-law approach" the "jury's determination [of damages] is * * * reviewed by trial and appellate courts to ensure that it is reasonable." *Haslip*, 499 U.S. at 15. See *TXO*, 113 S. Ct. at 2726 (Scalia, J., concurring in the judgment); *id.* at 2730 (O'Connor, J., dissenting). For example, in the seminal case involving the power of federal courts to use remittitur, Justice Story, sitting as Circuit Justice, explained:

> As to the question of excessive damages, I agree, that the court may grant a new trial for excessive damages. * * * It is indeed an exercise of discretion full of delicacy and difficulty. But if it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.

Blunt v. *Little*, 3 F. Cas. 760, 761-762 (D. Mass. 1822) (ordering new trial unless plaintiff agreed to remittitur). In the years prior to the adoption of the Fourteenth Amendment the same principle was applied by state courts across the country.[10]

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[10] See, *e.g.*, *Pleasants* v. *Heard*, 15 Ark. 403, 406 (1855) (new trial where damages award "shocks our sense of justice"); *Worster* v. *Proprietors of Canal Bridge*, 33 Mass. 541, 547-548 (1835) (new trial where damages "manifestly exorbitant"); *Sampson* v. *Smith*, 15 Mass. 365, 367 (1819) ("[w]e entertain no doubt of the authority of the court to set aside a verdict on account of the largeness of the damages"); *Travis* v. *Barger*, 24 Barb. 614, 629 (N.Y. App. Div. 1857) (new trial where award "flagrantly outrageous and extravagant"); *Collins* v. *Albany & Schenectady*

So well entrenched is the concept of judicial review of damages verdicts that, as far as we are aware, Oregon stands alone among the states in denying such review entirely. Every state other than Oregon gives trial judges the authority to grant new trials, or to condition the denial of a new trial on a plaintiff's acceptance of a remittitur, when the judge concludes that excessive damages have been awarded. And, as best we can tell, all other states provide in addition for some degree of appellate review of the trial court's excessiveness determination.[11] Indeed, the Oregon Supreme Court

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R.R., 12 Barb. 492, 495 (N.Y. Sup. Ct. 1852) ("The right of the court * * * to interfere, when the damages found by the jury are clearly excessive * * * has never been denied."); *Diblin* v. *Murphy*, 3 Sand. 19 (N.Y. Super. Ct. 1849) (ordering new trial unless plaintiff agreed to remittitur); *Thompson* v. *Morris Canal & Banking Co.*, 2 Harr. 480, 486-487 (N.J. 1840); *Guerry* v. *Kerton*, 18 S.C.L. (2 Rich.) 507 (Ct. App. 1846). See also *Belknap* v. *Boston & Maine R.R.*, 49 N.H. 358, 372 (1870) (new trial where jury "acted under the influence of a perverted judgment"); *McCarthy* v. *Niskern*, 22 Minn. 90, 91-92 (1875) (verdict set aside if "enormously in excess of what may justly be regarded as compensation"). The earliest American treatises on damages treated this principle as settled. See G. Field, *Law of Damages* 685-686 (1876) (new trials where jury awards "flagrantly excessive"); Washburn, *Study and Practice of Law* 246 (5th ed. 1876) (new trials serve "as a safeguard against the passions, prejudices, and mistakes to which juries are at times subject"); 1 J. Sutherland, *Law of Damages* 810 (1882) (new trials where jury acts with "perverted judgment").

[11] As of 1961, at least 47 of the 50 states afforded appellate review of a trial court's denial of a new trial or remittitur on grounds of the excessiveness of the verdict. *Dagnello* v. *Long Island R.R.*, 289 F.2d 797, 798-799 & n.1 (2d Cir. 1961) (citing cases from every state other than Alaska, Maryland, and Oregon). Since that time, appellate courts in Alaska and Maryland have recognized and exercised their authority to order new trials or

has recognized its "lonely eminence" in this regard. *Van Lom*, 210 P.2d at 471. See also *Rogers* v. *Hill*, 576 P.2d 328, 335 (Or. 1978) (Tongue, J., specially concurring) ("[n]o other state has adopted such a constitutional limitation upon the common law powers of the courts"); Lusk, *supra*, 35 Or. L. Rev. at 28 ("[s]o far as can be ascertained by an intensive search, no other state has ever gone to such lengths").

Against this background, the Oregon system comes to this Court with a heavy presumption of unconstitutionality. Oregon's practice of denying judicial excessiveness review is a "freakish" one that "finds no analogue in history or in the * * * law of other jurisdictions." *Schad* v. *Arizona*, 111 S. Ct. 2491, 2501 (1991) (plurality opinion). And given "the importance of history and widely shared practice as concrete indicators of what fundamental fairness and rationality require" (*ibid.*), Oregon's decision to withhold safeguards that have been provided by all other Anglo-American jurisdictions from time immemorial runs afoul of the Due Process Clause. Cf. *Solem* v. *Helm*, 463 U.S. 277, 290-292 (1983).

B. Oregon's Denial Of Judicial Excessiveness Review Deprives Litigants Of Procedures Essential To Ensure Fundamental Fairness.

The relevance to due process analysis of Oregon's departure from common-law practice is plain. While there has been some disagreement on the Court about the proper constitutional approach when traditional procedures that had currency at the time of ratification of the Fifth or Fourteenth

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remittitur because of an excessive damages award left standing by a trial court. See, *e.g.*, *City of Nome* v. *Ailak*, 570 P.2d 162, 173-174 (Alaska 1977); *Alexander & Alexander, Inc.* v. *B. Dixon Evander & Assocs., Inc.*, 596 A.2d 687, 709-711 (Md. Ct. Spec. App. 1991), cert. denied, 605 A.2d 137 (Md. 1992). To our knowledge, no state that afforded appellate review in 1961 has withdrawn it subsequently.

Amendments are themselves attacked (compare *Haslip*, 499 U.S. at 17-18 (majority opinion), and 60-63 (O'Connor, J., dissenting), with *id.* at 34-38 (Scalia, J., concurring in the judgment)), there is no doubt that when a State chooses to deviate from traditionally accepted procedures, those who would defend the State's aberrant approach have a high burden:

> [C]onsistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government.

Twining v. *New Jersey*, 211 U.S. 78, 101 (1908). See *Haslip*, 499 U.S. at 32 (Scalia, J., concurring in the judgment); *Burnham* v. *Superior Court*, 495 U.S. 604, 622 (1990) (opinion of Scalia, J.).

In analyzing the constitutional adequacy of such novel state procedures in the non-criminal context, the Court makes use of the familiar three-part test articulated in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), which it has "characterized * * * as 'a general approach for testing challenged procedures under a due process claim.'" *Medina* v. *California*, 112 S. Ct. 2572, 2576 (1992), quoting *Parham* v.

J.R., 442 U.S. 584, 599 (1979).[12] Under this approach, the Court must

> consider [1] the private interest affected by the official action; [2] the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and [3] the Government's interest, including the administrative burden that additional procedural requirements would impose.

United States v. *James Daniel Good Real Property*, No. 92-1180, slip op. at 9 (U.S. Dec. 13, 1993). See *Mathews*, 424 U.S. at 335. Consideration of these three elements demonstrates that Oregon's refusal to provide any judicial review of the size of a jury verdict violates due process.

1. *The Private Interest.* First, the private property interest at stake may be "enormous." *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting).[13] Money, in whatever amount, is a core property interest. See, *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564, 571-572 (1972) (stating that the concept

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[12] See, *e.g.*, *Burns* v. *United States*, 111 S. Ct. 2182, 2192-2193 (1991) (Souter, J., dissenting) ("The *Mathews* analysis has * * * been used as a general approach for determining the procedures required by due process whenever erroneous governmental action would infringe an individual's protected interest"); *Washington* v. *Harper*, 494 U.S. 210, 229 (1990); *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542-543 (1985); *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982).

[13] There can be no doubt that a damages verdict, compensatory or punitive, constitutes a deprivation of property. In fact, the proposition is so self-evident that this Court routinely analyzes due process challenges to civil trial procedures without even pausing over the threshold question whether a property interest protected by the Due Process Clause exists. See, *e.g.*, *TXO*, *supra*; *Haslip*, *supra*; *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985).

of "property" is not limited to "real estate, chattels, or money"). Moreover, in today's litigation climate the *amount* of money involved can be staggering: the size of a damages award is limited only by the jury's (or, as in this case, the plaintiff's) imagination, and seven-, eight-, and even nine-figure judgments are now common (and, everywhere other than Oregon, are commonly reduced).[14]

Oregon is no exception; in addition to the judgment in this case, Oregon juries recently have returned verdicts of

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[14] See, *e.g.*, *Texaco, Inc.* v. *Pennzoil Co.*, 729 S.W.2d 768, 866 (Tex. Ct. App. 1987) ($3 billion punitive award reduced to $1 billion), cert. dismissed, 485 U.S. 994 (1988); *Grimshaw* v. *Ford Motor Co.*, 174 Cal. Rptr. 348, 389-391 (Cal. Ct. App. 1981) (affirming order granting new trial unless plaintiff accepted remittitur of punitive judgment from $125 million to $3.5 million); *Award Is Slashed*, Nat'l L.J., Aug. 31, 1992, at 6 (reporting that Illinois trial court had ordered $124.5 million punitive award against The Upjohn Company remitted to $35 million); *Alexander & Alexander*, 596 A.2d at 710-711 (jury imposed $40 million punitive exaction; trial court ordered remittitur to $12.5 million; appellate court ordered new trial on ground that $12.5 million was grossly excessive); *Republic Ins. Co.* v. *Hires*, 810 P.2d 790, 793 (Nev. 1991) (reducing punitive award from $22.5 million to $5 million); *State Farm Mut. Auto. Ins. Co.* v. *Zubiate*, 808 S.W.2d 590, 605-606 (Tex. Ct. App. 1991) (ordering new trial unless plaintiff accepted remittitur of punitive award from $15 million to $600,000), writ denied (Sept. 18, 1991); *Machine Maintenance & Equip. Co.* v. *Cooper Indus., Inc.*, 661 F. Supp. 1112, 1117-1118 (E.D. Mo. 1987) (ordering new trial unless plaintiff accepted remittitur of punitive award from $10 million to $100,000); *Sears, Roebuck & Co.* v. *Harris*, No. 1911519, 1993 WL 341147, at *15-*16 (Ala. Sept. 10, 1993) (ordering $5.5 million compensatory judgment reduced to $850,001). See generally *Huge Jury Awards Often Don't Survive Appeals and Motions*, Nat'l L.J., Jan. 25, 1993, at S20. A more complete list of recent remittiturs and reductions appears in Appendix A, *infra*.

approximately $9 million and $7 million. See *Eulrich* v. *Snap-On Tools Corp.*, 853 P.2d 1350 (Or. Ct. App.), rev. denied, 859 P.2d 540 (Or. 1993), cert. pending, No. 93-697; *Lovejoy Specialty Hospital, Inc.* v. *Advocates for Life, Inc.*, 855 P.2d 159 (Or. Ct. App.), rev. denied, 863 P.2d 1267 (Or. 1993). And the significance of the private interest is compounded by the "quasi-criminal" nature of a punitive judgment (*Haslip*, 499 U.S. at 19), for a defendant who is forced to pay a large punitive award will suffer serious reputational injury. See *id.* at 54 (O'Connor, J., dissenting); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 281 (1983). Cf. *Addington* v. *Texas*, 441 U.S. 418, 424 (1979). Defendants have an obvious, strong, and legitimate interest in not being made to pay such judgments in the absence of adequate procedural safeguards.

2. *The Likelihood of Error.* a. There is a real and substantial risk that, in the absence of some form of judicial review, defendants will suffer an erroneous deprivation of their property. It has been said that "[t]he jury system has long been a guarantor of fairness, a bulwark against tyranny, and a source of civic values" (*TXO*, 113 S. Ct. at 2728 (O'Connor, J., dissenting)), and we certainly do not take issue with that proposition.[15] But one need not share Mark Twain's rather more jaundiced view of the jury — that it "would prove the most ingenious and infallible agency for

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[15] It may be noted, however, that "[a]lthough the jury has been, throughout its history, 'eulogized by judges and lawyers in terms more glowing than have been applied to any other institution,' it has in reality always been viewed ambivalently as an adjudicative body." Ellis, *Punitive Damages, Due Process, and the Jury*, 40 Ala. L. Rev. 975, 995 (1989) (footnotes omitted). "[V]irtually from its inception, it has been the subject of deep controversy, attracting at once the most extravagant praise and the most harsh criticism." H. Kalven & H. Zeisel, *supra*, at 4.

defeating justice that human wisdom could contrive" (M. Twain, *Roughing It* 256 (Signet ed. 1980) (emphasis in original))[16] — to recognize that juries are capable of making serious errors.

It could hardly be otherwise. As the leading scholars of the subject have observed,

> A jury is composed of untrained citizens, drawn randomly from the eligible population, convened briefly for a particular trial, entrusted with great official powers, permitted to deliberate in secret, to render a verdict without explanation, and, without any accountability then or ever, to return to private life.

M. Saks, *Jury Verdicts: The Role of Group Size and Social Decision* 6 (1977). See H. Kalven & H. Zeisel, *supra*, at 3. While a whole constellation of considerations leads judges to arrive (by and large) at well-reasoned and objectively "correct" decisions, "the incentives to individuals as members of a jury to base their decisions on only the evidence, to follow the judge's instructions, and to arrive at a 'correct' decision seem almost nonexistent." Ellis, *supra*, 40 Ala. L. Rev. at 998. Students of the jury thus have found that juries sometimes "appl[y] evidence incorrectly, award[] compensation for expenses they were not supposed to

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[16] Twain added that "[t]he jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury. It is a shame that we must continue to use a worthless system because is *was* good a thousand years ago." M. Twain, *supra*, at 257 (emphasis in original). Or to paraphrase Judge Jerome Frank, "the jury applies law it doesn't understand to facts it can't get straight." Vidmar, *Foreward: Empirical Research and the Issue of Jury Competence*, 52 Law & Contemp. Probs. 1, 1 (1989) (footnote omitted) (citing J. Frank, *Courts on Trial: Myth and Reality in American Justice* (1945)).

consider, and consider[] extralegal factors in determining liability and punitive awards." M. Selvin & L. Picus, *The Debate Over Jury Performance: Observations From a Recent Asbestos Case* ix (1987). More generally, it seems clear from the work of social scientists that juries "are occasionally biased against corporate defendants." Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 Law & Contemp. Probs. 224, 246 (1989). See A. Chin & M. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* 42-45 (1985) (in personal injury trials, corporate and governmental defendants more likely to be found liable and to be required to pay larger damages); Hans & Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 Law & Human Behavior 151 (1989) (same).

Moreover, even the best-intentioned jury, as Blackstone (himself a great defender of the institution) observed more than two centuries ago, may return an incorrect verdict because of "inexperience in business, incapacity, misapprehension, inattention to circumstances, and a thousand other innocent causes." 3 W. Blackstone, *supra*, at 389. After all, "[t]here is no guarantee that members of a particular jury may not be quite unusually ignorant, credulous, slow-witted, narrow-minded, biased or temperamental." G. Williams, *The Proof of Guilt* 272 (3d ed. 1963). It thus is inarguable that juries' decisions "can be shaped by influences impermissible in our system of justice. In fact, they are more susceptible to such influences than judges." *TXO*, 113 S. Ct. at 2728 (O'Connor, J., dissenting).

b. The likelihood of juror error that exists in all cases is greatly increased by the nature of the question posed to the jury when punitive damages are at issue. While juries are thought to be especially effective in making factual determinations that are within the common experience of lay men and women, "determining the amount of punitive damages smells more like sentencing than fact-finding. It does not require answering a 'what happened' question.

Rather, it embodies the question, 'what ought to happen' to the defendant, an issue typically committed to the judge, not the jury, in a criminal case." Ellis, *supra*, 40 Ala. L. Rev. at 1004.

Indeed, as the Court has noted, "highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties * * * . These are the kinds of calculations traditionally performed by judges." *Tull* v. *United States*, 481 U.S. 412, 427 (1987). "Determining a fair penalty and one that will likely bring about an appropriate level of deterrence, neither too much nor too little, does not invoke a familiarity of what the Court called in *Railroad Co. v. Stout*[, 84 U.S. (17 Wall.) 657, 664 (1873),] 'the common affairs of life.' * * * Such a sanction represents an example of those 'issues . . . presented for adjudication which are far removed from commonplace activities and accidents familiar to the man on the street.'" Ellis, *supra*, 40 Ala. L. Rev. at 1006 (footnotes omitted), quoting J. Fleming, *The American Tort Process* 113 (1988).

Jurors judging a punitive damages case thus labor under a significant handicap that derives from the nature of the institution. A jury considers its case in isolation; it lacks the information and experience needed to place the particular defendant's actions in context, and typically has no knowledge of the range of punishments to which comparable wrongdoers have been subjected. A jury is therefore far less able than a judge to devise a sanction that is appropriately proportioned to the relative wrongfulness of the defendant's conduct. See Wheeler, *supra*, 69 Va. L. Rev. at 286; Ellis, *supra*, 40 Ala. L. Rev. at 1007.

Moreover, the difficulty that a jury will have in reaching a correct decision is compounded by a feature of punitive damages regimes that seems calculated to *induce* an incorrect decision: in Oregon, as in many states, juries are informed of the defendant's wealth, and plaintiffs' counsel may urge

the jury — as happened in this case (see page 4, *supra*) — to transfer some of that wealth to the plaintiff.[17] It has long been a commonplace that juries bedazzled by evidence of the size and financial condition of a wrongdoer and feeling "antipathy to a wealthy, out-of-state corporate defendant" may surrender to "redistributionist impulses." *TXO*, 113 S. Ct. at 2725-2726 (Kennedy, J., concurring in part and concurring in the judgment). This unsurprising temptation means that evidence of wealth "may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1191 (1931). See Abraham & Jeffries, *supra*, 18 J. Legal Stud. at 424; Ellis, *supra*, 40 Ala. L. Rev. at 996.

In *TXO*, seven Justices accordingly noted that "the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the

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[17] Courts have permitted consideration of wealth in the assessment of punitive damages (see *TXO*, 113 S. Ct. at 2737-2738 (O'Connor, J., dissenting)), a practice that may make great sense in determining the appropriate level of punishment for an individual defendant. But commentators are virtually unanimous in the view that a *corporate* defendant's wealth has no rational connection to the setting of an appropriate penalty. See, *e.g.*, Abraham & Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. Legal Stud. 415, 421-422 (1989); Chapman & Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 Ala. L. Rev. 741, 824-826 (1989); Cooter, *Punitive Damages for Deterrence: When and How Much*, 40 Ala. L. Rev. 1143, 1176-1177 (1989); *Symposium Discussion, Punitive Damages*, 56 S. Cal. L. Rev. 155, 190-191 (1982) (comments by Professors Jack L. Carr and Malcolm E. Wheeler). Cf. *Zazu Designs* v. *L'Oreal, S.A.*, 979 F.2d 499, 508-509 (7th Cir. 1992) (Easterbrook, J.).

defendant is a non-resident." 113 S. Ct. at 2723 (Stevens, J., joined by Rehnquist, C.J., and Blackmun and Kennedy, JJ.). See *id.* at 2737, 2738 (O'Connor, J., joined by White and Souter, JJ., dissenting) ("Courts long have recognized that jurors may view large corporations with great disfavor. * * * [T]he temptation to transfer wealth from out-of-state corporate defendants to in-state plaintiffs can be quite strong.") In these circumstances, it would be the more remarkable if juries failed to return excessive verdicts with some regularity.

It may be added that, while these problems are magnified in cases involving punitive damages, they also are present to some degree where compensatory awards are at issue, particularly when the plaintiff seeks damages for intangibles such as pain and suffering. "Medical expense and economic loss do have some objective reality but the warrant to add pain and suffering gives the jury immediate freedom to price the injury subjectively." Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 Ohio St. L.J. 158, 161 (1958). Here, for example, the jury was told that "[t]he law does not furnish you with any fixed standard by which to measure the exact amount of general damages." Tr. 2942. And bias against corporate defendants (see page 23, *supra*) may infect a case even when evidence of wealth is not placed before the jury; that is especially so when the defendant is a well-known foreign-owned corporation, as is true here. As Judge Jerome Frank observed, "[t]hat the defendant is a wealthy corporation and the plaintiff is a poor boy * * * often determine who will win or lose." J. Frank, *Law and the Modern Mind* 177-178 (1949).

c. Common sense thus suggests that jurors will make errors in setting damages awards. But we need not rely on logic to establish that proposition: empirical data demonstrate that trial and appellate judges frequently find it necessary to reduce or remit damages awarded by juries. These actions are significant because every case in which a judge finds an

award excessive is, by definition, a case in which the jury's award, if uncorrected, would have worked an erroneous deprivation of property.[18]

We have reviewed all reported cases, state and federal, in which punitive damages awards were contested as excessive during 1992 and 1993.[19] In 90 of the 271 cases in our sample, the awards were set aside altogether. (These cases are listed in Appendix C, *infra*.) And most important for present purposes, of the remaining 181 cases, 51 — or more than 28% — saw reductions in the punitive damages award. (Cases in which awards were reduced or remitted are listed in Appendix A, *infra*; cases in which excessiveness

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[18] A court will reduce a punitive judgment when the award runs afoul of the constraints on punitive verdicts that are set by state law (typically, as in Oregon, see Pet. App. 24a, that the award serve the purposes of punishment and deterrence and that it not be the product of passion or bias). The Due Process Clause mandates that the state, having imposed these constraints on the deprivation of property, minimize departures from the state-law standards. See generally *Bell* v. *Burson*, 402 U.S. 535, 541 (1971); *Logan*, 455 U.S. at 433-434. In addition, of course, a majority of the Members of this Court have recognized that "the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'" *TXO*, 113 S. Ct. at 2718 (plurality opinion) (citation omitted). See *id.* at 2731 (O'Connor, J., dissenting) ("It is * * * common ground that an award can be so excessive as to violate due process."). An award that is constitutionally excessive plainly also must be viewed as working an erroneous deprivation of property.

[19] To construct our sample, we searched the Westlaw electronic database for all cases involving punitive damages that discuss remittitur, reductions, or excessiveness. In technical terms, our search — drawn to be as inclusive as possible — was "punitive or exemplary/50 reduc! or remit! or exces! & da (>1991)." We conducted the search in Westlaw files "allstates" and "allfeds."

arguments were rejected are listed in Appendix B, *infra*.)[20] These findings are consistent with the conclusions of all of the published empirical studies on the subject.[21]

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[20] Concededly, a survey of reported decisions makes use of a sample that is to some extent skewed. Reported decisions are in large measure appellate decisions, and the cases most likely to be appealed are those where the damages awards are the largest (and therefore, presumably, the most likely to be reduced). See generally Landes & Posner, *New Light on Punitive Damages*, Regulation (Sept./Oct. 1986) at 34. On the other hand, such a survey omits the large volume of cases in which awards are reduced by trial courts or are settled at a significant discount while an appeal is pending; there is reason to believe that there are a substantial number of such cases. See note 21, *infra*. Whatever the precise numbers, then, our survey establishes beyond dispute that punitive verdicts returned by juries are erroneous in a great many cases. And to the extent that our survey sample is skewed towards cases (such as this one) involving larger punitive awards, those are, of course, the cases in which the greatest deprivations of property take place.

[21] The most oft-cited empirical study of punitive damages, which was conducted by the RAND Institute for Civil Justice, found that punitive awards were reduced or eliminated in 32 out of a sample of 68 punitive verdicts returned in two jurisdictions between 1979 and 1983. Twenty-one of the 32 awards were reduced through post-judgment settlement. Larger verdicts were much more likely to be reduced; although awards were reduced in just under 50% of all cases, awards where reductions took place "involved nearly 90 percent of the total money at stake." M. Peterson, S. Sarma, & M. Shanley, *Punitive Damages: Empirical Findings* 28 (RAND Institute for Civil Justice 1987). The study found that "[n]early every large award received some reduction — nine of 10 cases with a punitive award greater than $50,000." *Id.* at 30. Other studies have reached similar results. See U.S. Gen. Acct. Office, Report to the Chairman, Subcomm. on Commerce, Consumer Protection, and Competitiveness, Comm. on Energy and Commerce, House of Representatives, *Product Liability, Verdicts and Case Resolution in Five States*, GAO/HRD-89-99 42 (Sept. 1989) (post-trial reductions in 82% of 23 punitive verdicts studied); Wheeler, *supra*, 69 Va. L. Rev. at 288 (of 45 appellate decisions in New York in decade before 1983 addressing punitive damages, punitive awards remitted or reversed in 35); Landes & Posner, *supra*, Regulation 35 (punitive award reversed in six of 10 federal appellate cases addressing punitive damages, and reduced in one); Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes With Empirical Data*, 78 Iowa L. Rev. 1, 54-56 (1992) (of 260 products liability punitive awards between 1965 and 1990, punitive awards were reversed in approximately 23%, reduced in 8.5%, and settled in 39.6%; in the 80 cases settled prior to appeal, 19 plaintiffs settled for no punitive damages and another 17 settled for a reduced award); M. Rustad, *Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts* 30-32 (Roscoe Pound Foundation 1991) (slightly more than half of products liability punitive awards reversed or adjusted downwards in 1970s and 1980s). While these studies are not precisely on point here because they do not, for the most part, distinguish between post-verdict decisions setting aside awards on the ground that the jury should not have imposed punitive liability at all (which may occur in Oregon) and those decisions finding awards excessive (which may not occur in Oregon), they clearly show that jury error in this area occurs with great frequency. (We note that reduction of punitive awards through post-trial settlement, which appears to be common, almost surely is influenced by the availability of excessiveness review.)

Against this background, it is simply indisputable that a very substantial percentage of punitive jury awards are excessive and thus legally erroneous. Indeed, studies written from the perspective of — and often cited by — tort plaintiffs have found that "[j]udges frequently reverse or remit punitive damage awards in the postverdict stage." Rustad, *supra*, 78 Iowa L. Rev. at 51. As a consequence, advocates for plaintiffs have themselves recognized that "punitive damages are appropriately kept in check by judicial controls." Rustad, *supra*, 78 Iowa L. Rev. at 58. See Daniels & Martin, *Myth*

and Reality in Punitive Damages, 75 Minn. L. Rev. 1, 9 (1991) ("proponents [of the present punitive damages system] argue that trial court control and appellate review are adequate safeguards against potential jury abuse").[22]

Such checks on jury discretion are no less necessary in Oregon. The Oregon Supreme Court has itself recognized that its interpretation of Article VII, Section 3 left erroneous jury awards undisturbed in particular cases. See *Fowler* v. *Courtemanche*, 274 P.2d at 275 ("If this court were authorized to exercise its common law powers, we would unhesitatingly hold that the award of $35,000 as punitive damages was excessive * * *."); *Van Lom*, 210 P.2d at 462 ("[t]he court is of the opinion that the verdict * * * is excessive"). See also Lusk, *supra*, at 25 ("juries in Oregon, as elsewhere, do occasionally return verdicts which violate the principles of justice"). To be fundamentally fair, a procedural regime must provide a method designed to correct such errors.

d. In nevertheless holding the Oregon system constitutional, the court below relied on essentially one consideration: Oregon juries are instructed as to the factors that are relevant to the setting of a punitive award.[23] The

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[22] The availability of meaningful judicial review of the size of punitive awards was repeatedly invoked in *TXO* as one of the principal reasons why other checks on the administration of punitive damages are unnecessary. See, *e.g.*, Brief of Amicus Curiae Association of Trial Lawyers of America in Support of Respondents at 15-16; Brief of *Amicus Curiae* National Association of Securities and Commercial Law Attorneys in Support of Respondents at 25-30; Brief of Trial Lawyers for Public Justice As Amicus Curiae in Support of Respondents at 4; Brief of the Alabama Trial Lawyers Association as Amicus Curiae in Support of Respondents at 8.

[23] The court below also noted (Pet. App. 27a) that trial and appellate courts may review the sufficiency of the evidence

court opined that these instructions "are detailed and objective, resulting in their also being constitutionally sufficient. The criteria need not be applied in post-verdict or appellate review, but are permissibly — even preferably — applied by juries in the initial determination of punitive damages awards." Pet. App. 32a. But whatever the adequacy of the instructions for the purpose of informing the jury of its responsibility (as to which see generally *Haslip*, 499 U.S. at 19-20), they plainly did not cure the constitutional violation in this case.

As an initial matter, it is doubtful that any jury charge, no matter how detailed and narrowly focused, could obviate the need for judicial excessiveness review. For one thing, "jury researchers are nearly unanimous in giving the jury poor marks for its understanding of legal instructions." Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 Law & Contemp. Probs. 177, 185 (1989) (footnote omitted).[24] And even a jury that understands its

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supporting the imposition of *liability*, and that appellate courts may review the jury instructions. But an unjustly high damages award plainly cannot be rectified by post-verdict consideration of those wholly distinct questions.

[24] The evidence is overwhelming that juries often simply do not understand instructions. See, *e.g.*, V. Hans & N. Vidmar, *Judging the Jury* 120-127 (1986); Brodeur, *The University of Chicago Jury Project*, 38 Neb. L. Rev. 744 (1959); Ellis, *supra*, 40 Ala. L. Rev. at 1006-1007; Elwork & Sales, *Jury Instructions*, in *The Psychology of Evidence and Trial Procedure* 280 (S. Kassin & L. Wrightsman eds., 1985); Forston, *Judges's Instructions: A Quantitative Analysis of Jurors' Listening Comprehension*, 18 *Today's Speech* 34 (Nov. 1970); Hans, *supra*, 52 Law & Contemp. Probs. at 185 & n.54 (citing unpublished research); Kessler, *The Social Psychology of Jury Deliberations*, in *The Jury System in America: A Critical Overview* 69, 83 (R. Simon ed., 1975); Steele & Thornburg, *Jury Instructions: A Persistent Failure to*

instructions may fall subject to passion, bias, prejudice, arbitrariness, or (to repeat Blackstone's list) "inexperience in business, incapacity, misapprehension, [and] inattention to circumstances."

Equally as important, the instructions actually given in this case did not serve as a meaningful and effective constraint on the jury's discretion. After being told that the award of punitive damages was "discretionary," the jury was charged that it "shall" consider evidence of five factors: the likelihood that harm would arise from defendants' misconduct; the degree of defendants' awareness of that misconduct; the duration of the misconduct; the defendants' response upon receiving notice that the ATV was defective; and the defendants' financial condition. Pet. App. 23a n.11. The last of these considerations, as we explain above, is likelier to lead a jury astray than to facilitate a proper disposition of the case. As to the others, providing the jury with a brief list of relevant factors hardly eliminates the otherwise substantial risk of erroneous results.

While the jury was told to consider certain factors, it was not instructed whether those considerations were exclusive. It thus was not instructed whether it could take into account, for example, the possibility that Honda would be held liable for the same conduct in other cases (a factor that should not have been considered in setting an appropriate penalty); on the other hand, it was not told to *disregard* Honda's status as a foreign-owned company (a factor that was not properly considered). The jury was not told how to weigh the considerations it was given or how to balance them against one another. And, of course, the jurors could not be given expertise in assessing punishments and setting appropriate levels of deterrence. Thus, as one commentator recently

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Communicate, 67 N.C.L. Rev. 77, 80 (1988). For anecdotal examples, see Kalven, *supra*, 19 Ohio St. L.J. at 162-163.

noted, "[e]ven if some factors [given to the jury as bearing on the punitive damages calculation] are questions of pure fact" — and most of the considerations given to the jury in this case were not —

> the calculation of punitive damages cannot be said to be fact-dependent or meaningfully guided by a standard. Multi-factor approaches to the calculation of punitive damages typically allow the decisionmaker to decide for itself the relative importance of individual factors and to consider other factors as well. The decisionmaker then makes a highly discretionary determination from a wide range of choices.

Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 Geo. Wash. L. Rev. 723, 802 (1993). The risk of aberrational results accordingly is too high in the absence of meaningful judicial excessiveness review.

3. *The State's Interest.* Finally, the state's interest in preserving the existing scheme is insubstantial. Oregon already provides for post-trial and appellate review of certain issues (such as sufficiency of the evidence to establish liability) in damages cases, in the course of which courts necessarily familiarize themselves with the record; the added cost of providing excessiveness review would be insignificant. Cf. *James Daniel Good Real Property*, slip op. at 15 (requested procedure "creates no significant administrative burden" because "[n]o extra hearing would be required in the typical case"). Indeed, the fact that *no* other State denies excessiveness review is a powerful indication that the administrative costs of providing such review are not particularly heavy. See *Ake* v. *Oklahoma*, 470 U.S. 68, 78 (1985); *Santosky* v. *Kramer*, 455 U.S. 745, 767 (1982) (noting that

35 states provide requested safeguard).[25] Providing judicial excessiveness review therefore "would reduce factual error without imposing substantial fiscal burdens upon the State." *Ibid.*

That conclusion is dispositive, because "it is difficult to identify any interest of the State, other than in its economy, that weighs against recognition of" providing excessiveness review. *Ake*, 470 U.S. at 79. Oregon certainly has "no substantial interest in securing for plaintiffs * * * gratuitous awards of money damages far in excess of any actual injury." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). See *Haslip*, 499 U.S. at 59 (O'Connor, J., dissenting). In fact, the "avowed purpose of [Article VII, Section 3 of the Oregon Constitution] was to bring about an improved administration of justice by reducing retrials to a minimum and so diminishing delay and expense," a goal it achieved by means of "a drastic abridgment of the statutory power of circuit judges to grant new trials." Lusk, *supra*, 35 Or. L. Rev. at 3. In other words, Oregon has achieved economy through the simple expedient of declining to correct erroneous deprivations of property ordered by juries. As has been noted in a related setting, this means of achieving efficiency "is the very essence of arbitrary state action." *Logan*, 455 U.S. at 442 (opinion of Blackmun, J.).

Moreover, any state interest in economy must "necessarily [be] tempered by [the State's] interest in * * * fair and accurate adjudication[s]." *Ake*, 470 U.S. at 79. Cf. *Loudermill*, 470 U.S. at 544 (noting state's interest in not causing wrongful deprivations of property). A failure to

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[25] It bears noting that Oregon courts themselves routinely provide excessiveness review in cases arising under federal statutes, such as the Jones Act and the Federal Employers Liability Act. See, *e.g.*, *Staples* v. *Union Pacific R.R.*, 508 P.2d 426, 427 (Or. 1973).

correct excessive awards also imposes other societal costs. It is well-documented, for example, that the imposition of arbitrary and excessive punishments deters socially beneficial behavior and leads to serious misallocations of resources. See, *e.g.*, *Browning-Ferris*, 492 U.S. at 282-283 (O'Connor, J., concurring in part and dissenting in part); II American Law Institute, Reporters' Study, *Enterprise Responsibility for Personal Injury: Approaches to Legal and Institutional Change* 234 (1991). And uncertainty about the likely size of punitive (and, for that matter, compensatory) awards — an uncertainty that would be greatly compounded by the elimination of the tempering effects of judicial review — will discourage the settlement of litigation by making it impossible for the parties to place a "value" on any particular lawsuit. See Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 56-57 (1982). The failure to provide judicial excessiveness review therefore cannot be justified on utilitarian grounds.

Each of the *Mathews* considerations thus militates in favor of providing such review. The private interest is substantial. The likelihood of jury error is large, as is the corrective value of judicial oversight. And Oregon's interest in maintaining its current system is minimal. In such circumstances, the State's existing approach cannot stand.

C. The Decision Below Cannot Be Squared With *TXO* And *Haslip*.

While the Oregon system's departure from historical practice and failure of the *Mathews* test should dispose of this case, it may be added that there is nothing novel in Honda's contention that judicial excessiveness review is constitutionally required. To the contrary, this Court's decisions in *Haslip* and *TXO* plainly were premised on the understanding that such review is mandated by the Due Process Clause.

In *Haslip*, the Court held that the common law method of imposing punitive damages generally, and Alabama's system in particular, satisfy at least the minimum requirements of due process. The Court expressly recognized that judicial review of the size of punitive judgments is an essential component of the common law method:

> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

499 U.S. at 15. In rejecting the procedural due process challenge to Alabama's system, the Court accordingly emphasized the significance of judicial review, observing that Alabama trial courts are required to conduct a post-verdict hearing for purposes of assessing the reasonableness of punitive damages verdicts and that the Alabama Supreme Court subsequently conducts its own review of such exactions, applying a multi-factor test. *Id.* at 20-22. Indeed, the Court took pains to contrast the "detailed" review conducted by Alabama courts with the considerably more limited "passion, bias and prejudice" review available in some state systems, which had caused Justices concern in earlier cases. *Id.* at 21 & n.10. See also *id.* at 40 (Kennedy, J., concurring) ("[e]lements of whim and caprice do not predominate when the jury reaches a consensus based upon arguments of counsel, the presentation of evidence, and instructions from the trial judge, *subject to review by the trial and appellate courts*") (emphasis added).

The decision in *Haslip* has been generally understood to require post-verdict (and appellate) review of jury damages awards. The three Justices who expressly addressed the issue in *TXO* understood "*Haslip* [to] promise[] that, even if juries

occasionally fail[] to fulfill their function faithfully, trial and appellate courts [will] provide meaningful review sufficient to discern impermissible influences and guarantee constitutional results." 113 S. Ct. at 2742 (O'Connor, J., dissenting). In addition, with the exception of the one below, every state court to reach the question has concluded that *Haslip* requires judicial excessiveness review.[26] Indeed, some of the foremost advocates of the plaintiffs' side in the current punitive damages debate told the Court in *TXO* that "post-trial reductions and reversals are a critical part of the procedural reforms mandated by *Haslip* and, therefore, are an essential part of understanding the judicial checks on awards of punitive damages." Brief of amicus curiae University Scholars and Law Professors in Support of Respondents 26-27.

This understanding is confirmed by the decision in *TXO*, where every Member of the Court, explicitly or implicitly, recognized that judicial excessiveness review is

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[26] See, *e.g.*, *Adams* v. *Murakami*, 813 P.2d 1348, 1356 (Cal. 1991) ("At a minimum * * * the high court has made clear [in *Haslip*] a constitutional mandate for meaningful judicial scrutiny of punitive damages awards"); *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 907-910 (W. Va. 1991) ("dictates of *Haslip*" require "a meaningful and adequate review by the trial court using established procedures; and [] a meaningful and adequate appellate review"); *Alexander & Alexander*, 596 A.2d at 709-710 (appellate review necessary under *Haslip*); *Herman* v. *Sunshine Chemical Specialties, Inc.*, 627 A.2d 1081, 1085-1086 (N.J. 1993) ("At a minimum, due process requires appellate review of the award for reasonableness" under *Haslip* and *TXO*); *Kinard* v. *Crosby*, 433 S.E.2d 835, 839 (S.C. 1993) (post-verdict and appellate review necessary under *Haslip*). See also *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95, 105-106 (4th Cir. 1991). Cf. *Hodges* v. *S.C. Toof & Co.*, 833 S.W.2d 896, 902 (Tenn. 1992) (requiring under state law that trial judges review damage awards and set forth reasons for decision).

constitutionally required. In rejecting arguments for "heightened" judicial scrutiny of a punitive award, a plurality of three Justices (Stevens, J., joined by Rehnquist, C.J. and Blackmun, J.) found it crucial that, among other things, the award was "reviewed and upheld by the trial judge who also heard the testimony, and it was affirmed" on appeal; it was because the judgment was "the product of that process" that it was "entitled to a strong presumption of validity." 113 S. Ct. at 2719-2720. In addition, that plurality of three, joined by Justice Kennedy, examined the *quality* of the post-verdict review in the course of rejecting the argument that the review provided had been constitutionally inadequate. See *id.* at 2724. Significantly, the plurality did not suggest that review is simply unnecessary.[27]

The remaining five members of the Court were explicit on the point. Justice Scalia (joined by Justice Thomas) concluded that "'procedural due process' requires judicial review of punitive damages awards for reasonableness," emphasizing that "*judicial* assessment of [the damages'] reasonableness is a federal right." 113 S. Ct. at 2727 (emphasis in original). Justice Scalia added that "[p]rocedural due process also requires, I am certain, * * * judicial review of the reasonableness of jury-awarded compensatory damages (including damages for pain and suffering)." *Ibid.* And as noted above, the dissenters (Justice O'Connor, joined in full by Justice White and in relevant part by Justice Souter) were of the view that "trial and appellate

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[27] We note in this regard that the dissenting Justices understood the plurality opinion to accept the proposition that judicial review is required, although they took issue with the plurality's conclusion that the review provided by the West Virginia courts was adequate. See 113 S. Ct. at 2742 (O'Connor, J., dissenting) (under the plurality's approach, "courts now may disregard the post-trial review required by due process at whim or will, so long as they do not deny its necessity openly or altogether").

courts [sh]ould provide meaningful review." 113 S. Ct. at 2742. *Haslip* and *TXO* thus confirm what traditional due process considerations indicate: due process requires meaningful judicial review of the size of punitive (and, at least implicitly, compensatory) awards.

CONCLUSION

The decision of the Supreme Court of Oregon should be reversed.

Respectfully submitted.

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APPENDICES

APPENDIX A

In the following fifty-one cases reported on Westlaw as decided in 1992 and 1993, remittiturs were granted or affirmed based on the excessiveness of the jury verdict. *Dunn* v. *Hovic*, 1 F.3d 1371 (CA 3) (en banc) (reducing punitive damages award of $2 million, which had been reduced by trial court from $25 million, to $1 million), modified in part, 13 F.3d 58 (CA 3), cert. denied, 114 S. Ct. 650 (1993); *King* v. *Macri*, 993 F.2d 294 (CA 2 1993) (remitting puntive damages award of $250,000 to $150,000); *Keenan* v. *City of Philadelphia*, 983 F.2d 459 (CA 3 1992) (affirming remittiturs with respect to three of four defendants); *Ross* v. *Black & Decker, Inc.*, 977 F.2d 1178 (CA 7 1992) (remitting $10 million punitive damages award to $5 million), cert. denied, 113 S. Ct. (1993); *Vasbinder* v. *Scott*, 976 F.2d 118 (CA 2 1992) (reducing $150,000 awards against each defendant to $30,000 and $20,000); *Phelan* v. *Local 305 of United Ass'n of Journeymen & Apprentices of Plumbing and Pipefitting Indus.*, 973 F.2d 1050 (CA 2 1992) (affirming remittitur but remanding because of magistrate's failure to offer plaintiff option of a new trial), cert. denied, 113 S. Ct. 1415 (1993); *Brown* v. *Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (CA 11 1992) (trial court remitted $10 million jury award to $2 million; remittitur not challenged on appeal), cert. denied, 113 S. Ct. 2992 (1993); *Hill* v. *Marshall*, 962 F.2d 1209 (CA 6 1992) (reversing remittitur of entire punitive damages award, but remanding with directions to approve an amount of punitive damages reasonably supported by the evidence); *Ash* v. *Georgia-Pacific Corp.*, 957 F.2d 432 (CA 7 1992) (affirming reduction of $2.5 million to $500,000); *Hutchinson* v. *Stuckey*, 952 F.2d 1418 (CA D.C. 1992) (remanding for retrial on the basis of excessiveness of compensatory and puntive damages); *Jeffries* v. *Harleston*, 828 F. Supp. 1066 (S.D.N.Y. 1993) (reducing puntive damages award of $320,000 to $280,000); *Darby* v. *Heather Ridge*, 827 F. Supp. 1296 (E.D. Mich. 1993) (remitting punitive damages

award of $250,000 to $50,000); *Mitchell* v. *Globe Int'l Publishing, Inc.*, 817 F. Supp. 72 (W.D. Ark. 1993) (remitting $850,000 punitive damages award to $350,000 on remand from court of appeals for remittitur), appeal dismissed (CA 3 May 3, 1993); *Enstar Group, Inc.* v. *Grassgreen*, 812 F. Supp. 1562 (M.D. Ala. 1993) (remittitur of $18 million puntive damages award to $10 million); *Purgess* v. *Sharrock*, 1993 WL 328919 (S.D.N.Y. 1993) (unreported) (remitting $4.6 million punitive damages award to $500,000); *Moretto* v. *G & W Elec. Co.*, 1993 WL 127951 (S.D.N.Y. 1993) (unreported) (remittitur of $3,720,979 punitive damages award to $2,265,420); *Defender Indus.* v. *Northwestern Mutual Life Ins. Co.*, 809 F. Supp. 400 (D.S.C. 1992) (remittitur of $25 million to $5 million), aff'd, 989 F.2d 492 (CA 4 1993); *Chronicle Pub. Co.* v. *Legrand*, 1992 WL 420808 (N.D. Cal. 1992) (unreported) (vacating $1,275,000 punitive damages award on grounds of excessiveness); *Ebeling & Reuss, Ltd.* v. *Swarovski Int'l Trading Corp., A.G.*, 1992 WL 211554 (E.D. Pa. 1992) (unreported) (remitting $21.5 million to $16.5 million); *Reserve Nat'l Ins. Co.* v. *Crowell*, 614 So. 2d 1005 (Ala.) (affirming remittitur of $1 million puntive damages award to $600,000), cert. denied, 114 S. Ct. 84 (1993); *BMW of North America, Inc.* v. *Gore*, 1993 WL 460233 (Ala. 1993) (per curiam) (unreported) (remittitur of half of $4 million punitive damages award); *Northwestern Mutual Life Ins. Co.* v. *Sheridan*, 1993 WL 453023 (Ala. 1993) (unreported) (remittitur of half of $24,927,248 punitive damages award); *Big B, Inc.* v. *Cottingham*, 1993 WL 341132 (Ala. 1993) (unreported) (remitting $1 million puntive damages award to $600,000); *Joe Cooper & Assocs., Inc.* v. *Central Life Assurance Co.*, 614 So. 2d 982 (Ala. 1992) (trial court remitted $2 million punitive damages award to $300,000; not challenged on appeal); *Intercontinental Life Ins. Co.* v. *Lindblom*, 598 So. 2d 886 (Ala.) (remitting award totalling more than $3 million, including punitive damages, to $1 million), cert. denied, 113 S. Ct. 200 (1992); *General Motors*

Corp. v. *Johnston*, 592 So. 2d 1054 (Ala. 1992) (Reducing $15 million punitive damages award by half); *Herrick* v. *Quality Hotels, Inns & Resorts, Inc.*, 24 Cal. Rptr. 2d 203 (Cal. Ct. App. 1993) (affirming reduction of $150,000 punitive damages award by half); *Harris* v. *Hughes Aircraft Co.*, 23 Cal. Rptr. 2d 343 (Cal. Ct. App. 1993) (affirming remittitur of $3.5 million punitive damages award to $975,000); *Hilgedick* v. *Koehring Fin. Corp.*, 8 Cal. Rptr. 2d 76 (Cal. Ct. App. 1992) (ordering remittiturs of $5 million punitive damages award to $1,628,466 and $2.5 million punitive damages award to $160,440), review dismissed (Cal. July 15, 1993); *Wollersheim* v. *Church of Scientology of California*, 6 Cal. Rptr. 2d 532 (Cal. Ct. App. 1992) (unspecified punitive damages award remitted to $2 million), review dismissed (Cal. July 15, 1993); *Keohane* v. *Wilkerson*, 859 P.2d 291 (Colo. Ct. App. 1993) (affirming remittitur of $5000 punitive damages award to $2500); *Concors Supply Co.* v. *Giesecke Int'l, Ltd.*, 1992 WL 91151 (Del. Super. Ct.) (unreported) (punitive damages awards of $500,000 against each of two defendants remitted to $125,000 each), aff'd 618 A.2d 90 (Del. 1992); *Girsberger* v. *Kresz*, 1993 WL 533825 (Ill. App. Ct. 1993) (unreported) (affirming remmititur of $392,000 punitive damages award to $289,028 and $184,000 punitive damages award to $50,000); *Wedmore* v. *Jordan Motors, Inc.*, 589 N.E.2d 1180 (Ind. Ct. App. 1992) (affirming trial court remittitur of $400,000 punitive damages award to $20,000); *Jordan* v. *Intercontinental Bulktank Corp.*, 621 So. 2d 1141 (La. Ct. App. 1993) (reducing $1 million punitive damages award by half), cert. denied 114 S. Ct. 926 (1994); *Fraidin* v. *Weitzman*, 611 A.2d 1046 (Md. Ct. App. 1992) (holding $3 million punitive damages award excessive and remanding to trial court for reconsideration of remittitur); *Rosenbloom* v. *Flygare*, 501 N.W.2d 597 (Minn. 1993) (reducing $65,000 punitive damages award to $30,000); *Mrozka* v. *Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806 (Minn. Ct. App. 1992) (affirming remittitur of $2.7 million punitive damages award

to $187,000); *Dees* v. *American Nat'l Fire Ins. Co.*, 861 P.2d 141 (Mont. 1993) (affirming reduction of punitive damages award from $575,000 to $300,000); *Papa* v. *City of New York*, 598 N.Y.S.2d 558 (N.Y. App. Div. 1993) (reducing $2.5 million punitive damages award to $1 million); *Hart* v. *City of New York*, 588 N.Y.S.2d 1012 (N.Y. App. Div. 1992) (affirming remittitur of $250,000 punitive damages award to $100,000); *Rossignol* v. *Silvernail*, 586 N.Y.S.2d 343 (N.Y. App. Div. 1992) (affirming remittitur of $75,000 punitive damages award to $15,000); *Parkin* v. *Cornell University, Inc.*, 581 N.Y.S.2d 914 (N.Y. App. Div. 1992) (reducing $100,000 punitive damages award to $10,000); *Herald* v. *Hood*, 1993 WL 277541 (Ohio Ct. App. 1993) (unreported) (affirming reduction of $5 million punitive damages award to $2.5 million); *Scribner* v. *Hillcrest Medical Ctr.*, 1992 WL 551143 (Okla. Ct. App. 1992) (ordering remittitur of half of $10 million dollar punitive damages award or new trial), cert. denied, 114 S. Ct. 288 (1993); *Reccko* v. *Criss Cadillac Co.*, 610 A.2d 542 (R.I. 1992) (reducing $50,000 punitive damages award to $25,000); *Weir* v. *Citicorp Nat'l Servs., Inc.*, 435 S.E.2d 864 (S.C. 1993) (affirming remittitur of $500,000 punitive damages award to $275,000); *Simerly* v. *Edwards*, 1992 WL 62010 (Tenn. Ct. App. 1992) (unreported) (trial court granted remittitur of $6625 punitive damages award to $4,125; not challenged on appeal); *Texas Farmers Ins. Co.* v. *Soriano*, 844 S.W.2d 808 (Tex. Ct. App. 1992) (reducing $5 million punitive damages award to $1 million); *Wal-Mart Stores, Inc.* v. *Berry*, 833 S.W.2d 587 (Tex. Ct. App. 1992) (affirming reduction of $200,000 punitive damages award to $100,000); *Nash* v. *Dotseth*, 1993 WL 3630 (Wis. Ct. App. 1993) (unreported) (affirming reduction of punitive damages award from $15,000 to $2,000).

APPENDIX B

In the following one hundred thirty cases reported on Westlaw as decided in 1992 and 1993, awards of punitive damages were held not excessive. *Loughman* v. *Consol-Pennsylvania Coal Co.*, 6 F.3d 88 (CA 3 1993); *Rodick* v. *City of Schenectady*, 1 F.3d 1341 (CA 2 1993); *Capstick* v. *Allstate Ins. Co.*, 998 F.2d 810 (CA 10 1993); *Kienitzy* v. *McDonnell Douglas Corp.*, 990 F.2d 1051 (CA 8 1993); *Lynch* v. *Bryant*, 1993 WL 20141 (CA 6 1993) (unreported); *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 1993 WL 532709 (CA 8 1993) (unreported); *Massey* v. *Farmers Ins. Group*, 1993 WL 34770 (CA 10) (unreported), cert. denied, 113 S. Ct. 2345 (1993); *Hafner* v. *Brown*, 983 F.2d 570 (CA 4 1992); *Benny M. Estes & Assocs., Inc.* v. *Time Ins. Co.*, 980 F.2d 1228 (CA 8. 1992); *Latham Seed* v. *Nickerson Am. Plant Breeders, Inc.*, 978 F.2d 1493 (CA 8 1992), cert. denied, 113 S. Ct. 3037 (1993); *Peoples Bank & Trust Co.* v. *Globe Int'l Pub., Inc.*, 978 F.2d 1065 (CA 8 1992); *Ingram* v. *Acands, Inc.*, 977 F.2d 1332 (CA 9 1992); *Campbell* v. *Bartlett*, 975 F.2d 1569 (CA 10 1992); *Finley* v. *Empiregas, Inc.*, 975 F.2d 467 (CA 8 1992); *Broadcort Capital Corp.* v. *Summa Medical Corp.*, 972 F.2d 1183 (CA 10 1992); *Jordan* v. *Clayton Brokerage Co.*, 975 F.2d 539 (CA 8 1992), cert. denied, 113 S. Ct. 1272 (1993); *Brown* v. *Petrolite Corp.*, 965 F.2d 38 (CA 5 1992); *Stephens, Inc.* v. *Geldermann, Inc.*, 962 F.2d 808 (CA 8 1992); *Hardin, Rodriguez & Boivin Anesthesiologists, Ltd.* v. *Paradigm Ins. Co.*, 962 F.2d 628 (CA 7 1992); *Hygh* v. *Jacobs*, 961 F.2d 359 (CA 2 1992); *Bogan* v. *Stroud*, 958 F.2d 180 (CA 7 1992); *Wallace* v. *Mullholland*, 957 F.2d 333 (CA 7 1992); *Scheidt* v. *Klein*, 956 F.2d 963 (CA 10 1992); *Littlefield* v. *McGuffey*, 954 F.2d 1337 (CA 7 1992); *Hebron Pub. School Dist. No. 13* v. *U.S. Gypsum*, 953 F.2d 398 (CA 8 1992); *Barnwell* v. *Barber-Colman Co.*, 1992 WL 6013 (CA 4 1992) (unreported); *Hosseini* v. *Chowdry*, 1992 WL 16746 (CA 9

1992) (unreported); *In re Hawaii Federal Asbestos Cases*, 1992 WL 78092 (CA 9 1992) (unreported); *Nutri-Metics Int'l, Inc.* v. *Carrington Labs., Inc.*, 1992 WL 389246 (CA 9 1992) (unreported); *Maharis* v. *Omaha Vaccine Co.*, 1992 WL 133117 (CA 9 1992) (unreported); *Winters* v. *Union Tex. Petroleum Corp.*, 1992 WL 208171 (CA 10 1992) (unreported); *Bergeson* v. *Dilworth*, 1992 WL 64887 (CA 10 1992) (unreported); *Alberty* v. *Tyson Foods, Inc.*, 1992 WL 401599 (CA 10 1992) (unreported); *Troutt* v. *Charcoal Steak House, Inc.*, 835 F. Supp. 899 (W.D. Va. 1993); *In re Guam Asbestos Litig.*, 1993 WL 470426 (D. Guam 1993) (unreported); *Midland Management Corp.* v. *Computer Consoles, Inc.*, 1993 WL 69624 (N.D. Ill. 1993) (unreported); *Continental Trend Resources* v. *Oxy USA, Inc.*, 810 F. Supp. 1520 (W.D. Okla. 1992); *Bishop* v. *Mid-America Auto Auction, Inc.*, 807 F. Supp. 683 (D. Kan. 1992); *McCann* v. *Ruiz*, 802 F. Supp. 606 (D.P.R. 1992); *Weathers* v. *American Family Mutual Ins. Co.*, 793 F. Supp. 1002 (D. Kan. 1992); *Laughinghouse* v. *Risser*, 786 F. Supp. 920 (D. Kan. 1992); *Fenstermacher* v. *Telelect, Inc.*, 1992 WL 175114 (D. Kan. 1992) (unreported); *Lozier Corp.* v. *Gray*, 634 So. 2d 1034 (Ala. 1993); *Henderson* v. *Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993); *Phillips Colleges of Alabama, Inc.* v. *Lester*, 622 So. 2d 308 (Ala. 1993); *King Motor Co.* v. *Wilson*, 612 So. 2d 1153 (Ala. 1992); *Continental Eagle Corp.* v. *Mokrzycki*, 611 So. 2d 313 (Ala. 1992); *Atkins* v. *Lee*, 603 So. 2d 937 (Ala. 1992); *Empire Gas, Inc. of Belle Mina* v. *Cartwright*, 595 So. 2d 1348 (Ala. 1992); *Union Mortgage Co.* v. *Barlow*, 595 So. 2d 1335 (Ala.), cert. denied, 113 S. Ct. 301 (1992); *Allstate Ins. Co.* v. *Hilley*, 595 So. 2d 873 (Ala. 1992); *Smith* v. *States General Ins. Co.*, 592 So. 2d 1021 (Ala. 1992); *Cameron* v. *Beard*, 864 P.2d 538 (Alaska 1993); *Cater* v. *Cater*, 846 S.W.2d 173 (Ark. 1993); *Wheeler Motor Co.* v. *Roth*, 867 S.W.2d 446 (Ark. 1993); *Warhurst* v. *White*, 838 S.W.2d 350 (Ark. 1992); *Viking Ins. Co. of Wisconsin* v. *Jester*, 836

S.W.2d 371 (Ark. 1992); *Interstate Freeway Servs., Inc.* v. *Houser*, 835 S.W.2d 872 (Ark. 1992); *B & F Engineering, Inc.* v. *Cotroneo*, 830 S.W.2d 835 (Ark. 1992); *Cronk* v. *Intermountain Rural Elec. Ass'n*, 1992 WL 161811 (Colo. Ct. App. 1992) (unreported); *Schnabel* v. *Tyler*, 630 A.2d 1361 (Conn. Ct. App. 1993); *Mack Trucks, Inc.* v. *Conkle*, 436 S.E.2d 635 (Ga. 1993); *Oglethorpe Power Corp.* v. *Sheriff*, 436 S.E.2d 14 (Ga. Ct. App. 1993); *Clarke* v. *Cotton*, 429 S.E.2d 291 (Ga. Ct. App. 1993); *Cuddy Mountain Concrete, Inc.* v. *Citadel Constr., Inc.*, 824 P.2d 151 (Idaho 1992); *E.J. McKernan Co.* v. *Gregory*, 623 N.E.2d 981 (Ill. App. Ct. 1993); *Jerry Clark Equip., Inc.* v. *Harris*, 612 N.E.2d 858 (Ill. App. Ct. 1993); *Kochan* v. *Owens-Corning Fiberglass Corp.*, 610 N.E.2d 683 (Ill. App. Ct. 1993); *Marek* v. *Stepkowski*, 608 N.E.2d 285 (Ill. App. Ct. 1992); *Verdonck* v. *Scopes*, 590 N.E.2d 545 (Ill. App. Ct. 1992); *Hockenberg Equip. Co.* v. *Hockenberg's Equip. & Supply Co.*, 1993 WL 533870 (Iowa 1993) (unreported); *Nassen* v. *National States Ins. Co.*, 494 N.W.2d 231 (Iowa 1992), cert. denied, 113 S. Ct. 1846; *Hanson* v. *American Nat'l Bank & Trust Co.*, 865 S.W.2d 302 (Ky. 1993); *Sutton's Truck Parts, Inc.* v. *Roy*, 594 So. 2d 1375 (La. Ct. App. 1992); *Haworth* v. *Feigon*, 623 A.2d 150 (Me. 1993); *Market Tavern, Inc.* v. *Bowen*, 610 A.2d 295 (Md. Ct. Spec. App. 1992); *Hanks* v. *Hubbard Broadcasting, Inc.*, 493 N.W.2d 302 (Minn. Ct. App. 1992); *C & C Trucking Co.* v. *Smith*, 612 So. 2d 1092 (Miss. 1992); *Carpenter* v. *Chrysler Corp.*, 853 S.W.2d 346 (Mo. Ct. App. 1993); *Green* v. *Miller*, 851 S.W.2d 553 (Mo. Ct. App. 1993); *Horn* v. *Village Supermarkets, Inc.*, 615 A.2d 663 (N.J. Super. Ct. App. Div. 1992); *Rozwell* v. *Philanz Oldsmobile, Inc.*, 591 N.Y.S.2d 649 (N.Y. App. Div. 1992); *Chlystun* v. *kent*, 586 N.Y.S.2d 410 (N.Y. App. Div. 1992); *Lovell* v. *Nationwide Mutual Ins. Co.*, 424 S.E.2d 181 (N.C. Ct. App. 1993); *Juarez-Martinez* v. *Deans*, 424 S.E.2d 154 (N.C. Ct. App. 1993); *Maintenance Equip. Co.* v. *Godley Builders*, 420 S.E.2d 199 (N.C. Ct. App.

1992); *Dohme* v. *McCray*, 1993 WL 19613 (Ohio Ct. App. 1993); *Turner* v. *Bob Ross Buick, Inc.*, 1993 WL 485256 (Ohio Ct. App. 1993); *Vebalacker* v. *Cincom Sys., Inc.*, 608 N.E.2d 858 (Ohio Ct. App. 1992); *Calvert* v. *J.B. Hunt Transp.*, 856 P.2d 1011 (Okla. Ct. App. 1993); *Rodebush* v. *Oklahoma Nursing Homes, Ltd.*, 1993 WL 514683 (Okla. 1993) (remittitur sought and denied in trial court; point waived on appeal); *Mantha* v. *Liquid Carbonic Indus., Inc.*, 839 P.2d 200 (Okla. Ct. App. 1992); *Hansel* v. *National States Ins. Co.*, 437 S.E.2d 159 (S.C. Ct. App. 1993); *Kinard* v. *Crosby*, 433 S.E.2d 835 (S.C. 1993); *Hoff* v. *Bower*, 492 N.W.2d 912 (S.D. 1992); *Sweasey* v. *A.G. Edwards & Sons, Inc.*, 1992 WL 472170 (Tenn. Crim. App. 1992) (unreported); *Davis* v. *Twin City Fire Ins. Co.*, 865 S.W.2d 231 (Tex. Ct. App. 1993); *U.S. Sporting Prods., Inc.* v. *Johnny Stewart Game Calls, Inc.*, 865 S.W.2d 214 (Tex. Ct. App. 1993); *Fidelity & Guar. Ins. Underwriters, Inc.* v. *Saenz*, 865 S.W.2d 103 (Tex. Ct. App. 1993); *General Mills Restaurant, Inc.* v. *Clemons*, 865 S.W.2d 48 (Tex. Ct. App. 1993); *Hanyes & Boone* v. *Bowser Bouldin, Ltd.*, 864 S.W.2d 662 (Tex. Ct. App. 1993); *Qualicare of East Texas, Inc.* v. *Runnels*, 863 S.W.2d 220 (Tex. Ct. App. 1993); *Heil-Quaker Corp.* v. *Mischer Corp.*, 863 S.W.2d 210 (Tex. Ct. App. 1993); *Motsenbocker* v. *Potts*, 863 S.W.2d 126 (Tex. Ct. App. 1993); *Acme Boot Co.* v. *Montenegro*, 862 S.W.2d 806 (Tex. Ct. App. 1993); *Haryanto* v. *Saeed*, 860 S.W.2d 913 (Tex. Ct. App. 1993); *Borden, Inc.* v. *Guerra*, 860 S.W.2d 515 (Tex. Ct. App. 1993); *State Farm Fire & Casualty. Co.* v. *Simmons*, 857 S.W.2d 126 (Tex. Ct. App. 1993); *City of La Porte* v. *Prince*, 851 S.W.2d 876 (Tex. Ct. App. 1993); *Berry Property Management, Inc.* v. *Bliskey*, 850 S.W.2d 644 (Tex. Ct. App. 1993); *Greater Houston Transp. Co.* v. *Zrubeck*, 850 S.W.2d 579 (Tex. Ct. App. 1993); *Rhodes* v. *Batilla*, 848 S.W.2d 833 (Tex. Ct. App. 1993); *Keene Corp.* v. *Kirk*, 1993 WL 522584 (Tex. Ct. App. 1993) (unreported); *Nicolau* v. *State Farm Lloyds*,

1993 WL 521051 (Tex. Ct. App. 1993) (unreported); *Shandee Corp.* v. *Kemper Group*, 1993 WL 381227 (Tex. Ct. App. 1993) (unreported); *U.S. Brass Corp.* v. *Andraus*, 1993 WL 313208 (Tex. Ct. App. 1993) (unreported); *Browning-Ferris Indus., Inc.* v. *Lieck*, 845 S.W.2d 926 (Tex. Ct. App. 1992); *Tracy* v. *Annie's Attic, Inc.*, 840 S.W.2d 527 (Tex. Ct. App. 1992); *Prudential Ins. Co. of America* v. *Jeffersons Assocs., Ltd.*, 839 S.W.2d 866 (Tex. Ct. App. 1992); *Ethicon, Inc.* v. *Martinez*, 835 S.W.2d 826 (Tex. Ct. App. 1992); *Allied Towing Serv.* v. *Mitchell*, 833 S.W.2d 577 (Tex. Ct. App. 1992); *Beverley Enters. of Texas, Inc.* v. *Leath*, 829 S.W.2d 382 (Tex. Ct. App. 1992); *Goswami* v. *Thetford*, 829 S.W.2d 317 (Tex. Ct. App. 1992); *Rochelle Apartments Co.* v. *Mouradian*, 1992 WL 187125 (Tex. Ct. App. 1992) (unreported); *Ellis County State Bank* v. *Keever*, 1992 WL 379450 (Tex. Ct. App. 1992) (unreported); *Crookston* v. *Fire Ins. Exch.*, 860 P.2d 937 (Utah 1993); *Ong Int'l (USA) Inc.* v. *11th Ave. Corp.*, 850 P.2d 447 (Utah 1993); *Hinerman* v. *Daily Gazette Co.*, 423 S.W.2d 560 (W. Va. 1992), cert. denied, 113 S. Ct. 1384 (1993); *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992), aff'd, 113 S. Ct. 2711 (1993); *Sylvester* v. *La Rose*, 1992 WL 353526 (Wis. Ct. App. 1992) (unreported).

APPENDIX C

In the following ninety cases reported on Westlaw as having been decided in 1992 and 1993, jury awards of punitive damages have been reversed, remitted, or remanded for reconsideration on grounds other than excessiveness. *Koester* v. *American Republic Invs., Inc.*, 11 F.3d 818 (CA 8 1993) (insufficient evidence to support award of punitive damages); *Europlast, Ltd.* v. *Oak Switch Sys., Inc.*, 10 F.3d 1266 (CA 7 1993) (insufficient evidence to support puntive damages award); *Burke* v. *Deere & Co.*, 6 F.3d 497 (CA 8 1993) (insufficient evidence to support puntive damages award), cert. denied, 1993 WL 547871 (1994); *Toole* v. *McClintock*, 999 F.2d 1430 (CA 11 1993) (insufficient evidence to support puntivie damages award); *Morgan* v. *Woessner*, 997 F.2d 1244 (CA 9 1993) (punitive damages award remanded to district court for constitutional review), cert. dismissed, 114 S. Ct. 671 (1994); *Drabik* v. *Stanley-Bostitch, Inc.*, 997 F.2d 496 (CA 8 1993) (insufficient evidence to support award of punitive damages); *Trandes Corp.* v. *Guy F. Atkinson Co.*, 996 F.2d 655 (CA 4) (remitting punitive damages in accordance with statutory cap on punitive damages), cert. denied, 114 S. Ct. 443 (1993); *Packard* v. *Provident Nat'l Bank*, 994 F.2d 1039 (CA 3) (punitive damages not available as a matter of law), cert. denied, 114 S. Ct. 440 (1993); *Bierle* v. *Liberty Mutual Ins. Co.*, 992 F.2d 873 (CA 8 1993) (punitive damages vacated on j.n.o.v.); *Manildra Milling Corp.* v. *Ogilvie Mills, Inc.*, 1993 WL 217173 (CA Fed. 1993) (insufficient evidence of underlying tort claims); *Keenan* v. *City of Philadelphia*, 983 F.2d 459 (CA 3 1992) (insufficient evidence to support award of punitive damages against one of four defendants); *Wackenhut Applied Technologies Ctr., Inc.* v. *Sygnetron Protection Sys., Inc.*, 979 F.2d 980 (CA 4 1992) (remitting award to comport with Virginia's statutory damages cap); *Eaton* v. *Newport Bd. of Educ.*, 975 F.2d 292 (CA 6 1992) (reversing and vacating judgment on first amendment

grounds), cert. denied, 113 S. Ct. 2459 (1993); *Johnson* v. *Hugo's Skateway*, 974 F.2d 1408 (CA 4 1992) (vacating and remanding for new trial based on improper jury instructions); *Brown* v. *Petrolite Corp.*, 965 F.2d 38 (CA 5 1992) (one punitive damages award vacated because of insufficient actual damages to support punitive damages award); *Advanced Medical, Inc.* v. *Arden Medical Sys., Inc.*, 955 F.2d 188 (CA 3 1992) (setting aside punitive damages award because liability must be retried); *American Computech, Inc.* v. *National Medical Care, Inc.*, 1992 WL 66641 (CA 9 1992) (unreported) (instructional error); *Fleet Nat'l Bank* v. *Anchor Media Television*, 831 F. Supp. 16 (D.R.I. 1993) (insufficient evidence to support punitive damages award); *U.S. E.E.O.C.* v. *AIC Sec. Investigations, Ltd.*, 823 F. Supp. 571 (N.D. Ill. 1993) (reducing total puntiive damages award of $500,000 to $150,000 to conform to statutory damages cap); *Pacific Group* v. *First State Ins. Co.*, 1993 WL 540942 (N.D. Cal. 1993) (unreported) (vacating award of punitive damages on j.m.o.l); *Lightning Lube, Inc.* v. *Witco Corp.*, 802 F. Supp. 1180 (D.N.J. 1992) (granting j.m.o.l. on punitive damages award), aff'd, 4 F.3d 1153 (CA 3 1993); *Cain* v. *Armstrong World Indus.*, 785 F. Supp. 1448 (S.D. Ala. 1992) (compensatory damages award so excessive as to suggest entire verdict tainted); *Jacobs Mfg. Co.* v. *Sam Brown Co.*, 792 F. Supp. 1520 (W.D. Mo. 1992) (judgment reversed in its entirety); *Ebeling & Reuss, Ltd.* v. *Swarovski Int'l Trading Corp.*, 1992 WL 211554 (E.D. Pa. 1992) (part of award remitted as duplicative); *Grimes* v. *Stewart*, 628 So. 2d 467 (Ala. 1993) (insufficient evidence to support punitive damages); *Clarke-Mobile Counties Gas Dist.* v. *Reeves*, 628 So. 2d 368 (Ala. 1993) (judgment reversed in its entirety); *Delchamps, Inc.* v. *Morgan*, 601 So. 2d 442 (Ala. 1992) (insufficient evidence to support punitive damages award); *Melancon* v. *USAA Casualty Ins. Co.*, 849 P.2d 1374 (Ariz. Ct. App. 1992) (reversing punitive damages award on instructional error); *Rhue* v. *Dawson*, 841 P.2d 215 (Ariz. Ct. App. 1992) (remanding for trial court to consider whether

punitive damages award is excessive when considered together with large compensatory damages award); *Arkansas Kraft* v. *Cottrell*, 855 S.W.2d 333 (Ark. 1993) (reversing entire judgment because there was no evidence to support the underlying negligence claim); *Dillard Dept. Stores, Inc.* v. *Adams*, 867 S.W.2d 442 (Ark. 1993) (insufficient evidence to support punitive damages); *Tricou* v. *ACI Management, Inc.*, 823 S.W.2d 924 (Ark. Ct. App. 1992) (insufficient evidence to support punitive damages awward); *Nola M.* v. *University of Southern California*, 20 Cal. Rptr. 2d 97 (Cal. Ct. App. 1993) (reversing underlying claim); *Kenly* v. *Ukegawa*, 19 Cal. Rptr. 2d 771 (Cal. Ct. App. 1993) (reversing punitive damages award because it was not based on evidence of defendant's wealth); *Andrea N.* v. *Laurelwood Convalescent Hosp.*, 16 Cal. Rptr. 894 (Cal. Ct. App. 1993) (appeal of j.n.o.v. on punitive damages) *Jackson* v. *Johnson*, 7 Cal. Rptr. 2d 482 (Cal. Ct. App. 1992) (insufficient evidence to support punitive damages award); *Burgess* v. *Mid-Century Ins. Co.*, 841 P.2d 325 (Colo. Ct. App. 1992) (reducing punitive damages award to comport with statutory allowance of treble damages); *White* v. *Hansen*, 837 P.2d 1229 (Colo. 1992) (punitive damages vacated on j.n.o.v. because plaintiff was 50% at fault); *Lira* v. *Davis*, 832 P.2d 240 (Colo. 1992) (reducing punitive damages award after reducing compensatory damages award for comparative negligence to conform to statute prohibiting awards of punitive damages from exceeding awards of compensatory damages); *Calbert* v. *Volkswagen of America, Inc.*, 1993 WL 478079 (Del. Super. Ct. 1993) (affirming grant of j.n.o.v. on punitive damages); *Peninsula Fed. Sav. & Loan Ass'n* v. *DKH Properties, Ltd.*, 616 So. 2d 1070 (Fla. Ct. App. 1993) (judgment reversed in entirety); *Georgia Ports Auth.* v. *Hutchinson*, 434 S.E.2d 791 (Ga. Ct. App. 1993) (punitive damages award held void as against public policy); *J.B. Hunt Transp., Inc.* v. *Bentley*, 427 S.E.2d 499 (Ga. Ct. App. 1992) (insufficient evidence to exceed punitive damages cap; awards reduced accordingly); *Adams* v. *Krueger*, 856 P.2d

864 (Idaho 1993) (reversing for insufficient evidence to support underlying claim); *Curtis* v. *Firth*, 850 P.2d 749 (Idaho 1993) (punitive damages award remanded for trial court to make findings of fact concerning excessiveness); *Kennan* v. *Checker Taxi Co.*, 620 N.E.2d 1208 (Ill. App. Ct. 1993) (insufficient evidence to support punitive damages); *Homewood Fishing Club* v. *Archer Daniels Midland Co.*, 605 N.E.2d 1140 (Ill. App. Ct. 1992) (insufficient evidence to support punitive damages); *Abshire* v. *Stoller*, 601 N.E.2d 1257 (Ill. App. Ct. 1992) (reversing punitive damages against one defendant as a matter of law); *Kritzen* v. *Flender Corp.*, 589 N.E.2d 909 (Ill. App. Ct. 1992) (insufficient evidence to support punitive damages award); *Barnes* v. *Barnes*, 603 N.E.2d 1337 (Ind. 1992) (remanding for new trial on underlying liability claims); *Beeman* v. *Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247 (Iowa 1993) (appeal of j.n.o.v. on punitive damages); *Gillespie* v. *Seymour*, 853 P.2d 692 (Kan. 1993) (reversing because trial court failed to make findings of fact sufficient to afford meaningful appellate review); *Caldor, Inc.* v. *Bowden*, 625 A.2d 959 (Md. 1993) (remanding punitive damages because there may not have been actual damages); *Medical Mutual Liab. Ins. Soc'y of Maryland* v. *B. Dixon Evander & Assocs., Inc.*, 609 A.2d 353 (Md. Ct. Spec. App. 1992) (vacating puntive damages award and remanding for full consideration of whether award is excessive as constitutionally required); *Owens-Illinois, Inc.* v. *Armstrong*, 604 A.2d 47 (Md.) (reversing punitive damages on basis of instructional error), cert. denied, 113 S. Ct. 204 (1992); *Bougie* v. *Sibley Manor, Inc.*, 504 N.W.2d 493 (Minn. Ct. App. 1993) (reversing punitive damages for failure of trial court to make statutory findings); *Illinois Cent. R. Co.* v. *White*, 610 So. 2d 308 (Miss. 1992) (affirming grant of j.n.o.v. on punitive damages award); *Finkelberg* v. *Luckett*, 608 So. 2d 1214 (Miss. 1992) (insufficient evidence to support punitive damages award); *Strothkamp* v. *Chesebrough-Pond's, Inc.*, 1993 WL 79239 (Mo. Ct. App. 1993) (appeal of j.n.o.v. on punitive

damages); *Ross* v. *Ford Motor Credit Co.*, 867 S.W.2d 546 (Mo. Ct. App. 1993) (insufficient evidence to support punitive damages); *Hogan* v. *Armstrong World Indus.*, 840 S.W.2d 230 (Mo. Ct. App. 1992) (insufficient evidence to support award of punitive damages); *Knopke* v. *Knopke*, 837 S.W.2d 907 (Mo. Ct. App. 1992) (insufficient evidence to support punitive damages award); *Bostic by Bostic* v. *Bill Dillard Shows, Inc.*, 828 S.W.2d 922 (Mo. Ct. App. 1992) (insufficient evidence to support award of punitive damages); *Wachstein* v. *Slocum*, 625 A.2d 527 (N.J. Super. Ct. App. Div. 1993) (punitives vacated because basis for award unclear); *Prozeralik* v. *Capital Cities Communications, Inc.*, 605 N.Y.S.2d 218 (N.Y. 1993) (instructional error); *Sogg* v. *American Airlines, Inc.*, 603 N.Y.S.2d 21 (N.Y. App. Div. 1993) (awards of punitive damages not permitted under plaintiff's statutory cause of action); *Williams* v. *Moore*, 602 N.Y.S.2d 199 (N.Y. App. Div. 1993) (insufficient evidence to support punitive damages); *Nuccio* v. *Chou*, 585 N.Y.S.2d 170 (N.Y. App. Div. 1992) (entire judgment reversed); *Moskovitz* v. *Mt. Sinai Medical Ctr.*, 1993 WL 4549 (Ohio Ct. App. 1993) (reversed on insufficiency of evidence); *Mitterholzer* v. *Bancsi*, 1993 WL 215381 (Ohio Ct. App. 1993) (unreported) (insufficient evidence to support punitive damages); *Bross* v. *Smith*, 608 N.E.2d 1175 (Ohio Ct. App. 1992) (reversing entire judgment), 113 S. Ct. 2340 (1993); *Nalley* v. *Kellwood Co.*, 1993 WL 562078 (Okla. Ct. App. 1993) (unreported) (reducing punitive damages award under statute limiting such awards to the amount awarded as compensatory damages); *Wilson* v. *Hess-Sweitzer & Brant, Inc.*, 1993 WL 501052 (Okla. 1993) (unreported) (affirming remittitur of unspecified punitives damages under statute prohibiting amount of punitive damages from exceeding amount of compensatory damages); *Brown* v. *MFC Fin. Co. of Oklahoma*, 838 P.2d 524 (Okla. Ct. App. 1992) (reducing punitive damages award because trial court failed to make finding that clear and convincing evidence warranted an award in excess of the compensatory damages award); *Rogue*

Fed. Credit Union v. *Phillips*, 855 P.2d 1146 (Or. Ct. App. 1993) (holding that punitive damages were precluded as a matter of law); *Foggie* v. *CSX Transp., Inc.*, 431 S.E.2d 587 (S.C. 1993) (reversing punitive damages as precluded by statute); *Pullen* v. *Textron*, 845 S.W.2d 777 (Tenn. Ct. App. 1992) (remanding punitive damages claim for new trial under newly announced principles of punitive damages liability); *Sasser* v. *Averitt Express, Inc.*, 839 S.W.2d 422 (Tenn. Ct. App. 1992) (remanding punitive damages claim for new trial under newly announced principles of punitive damages liability); *Hodges* v. *S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992) (vacating entire judgment and announcing new standards for punitive damages awards); *Ward* v. *Terminix Int'l. Inc.*, 1992 WL 227405 (Tenn. 1992) (unreported) (remanding punitive damages claim for new trial under newly announced principles of punitive damages liability); *Missouri Pacific R.R. Co.* v. *Lemon*, 861 S.W.2d 501 (Tex. Ct. App. 1993) (reducing punitive damages award under statute limiting such awards to four times survival recovery); *Phar-Mor, Inc.* v. *Chavira*, 853 S.W.2d 710 (Tex. Ct. App. 1993) (insufficient evidence to support punitive damages); *General Chem. Corp.* v. *De La Lastra*, 852 S.W.2d 916 (Tex.) (reducing punitive damages award under statute limiting such awards to four times survival recovery), cert. dismissed 114 S. Ct. 490 (1993); *Wal-Mart Stores, Inc.* v. *Alexander*, 1993 WL 502513 (Tex. 1993) (unreported) (insufficient evidence to support punitive damages); *Schindler* v. *Austwell Farmers Coop.*, 841 S.W.2d 853 (Tex. 1992) (insufficient evidence of underlying claim which supported punitive damages award); *Transportation Ins. Co.* v. *Archer*, 832 S.W.2d 403 (Tex. Ct. App. 1992) (reversed for legally erroneous basis of claim); *Circle Y of Yoakum* v. *Blevins*, 826 S.W.2d 753 (Tex. Ct. App. 1992) (reversing and remanding for new trial on basis of improper argument); *Marina Shores, Ltd.* v. *Cohn-Phillips, Ltd.*, 435 S.E.2d 136 (Va. 1993) (reversing judgment in its entirety); *Tazewell Oil Co.* v. *United Virginia Bank/Crestar Bank*, 413 S.E.2d 611 (Va. 1992) (affirming

grant of j.n.o.v. on puntive damages award); *Mace* v. *Charleston Area Medical Ctr. Found., Inc.*, 422 S.E.2d 624 (W. Va. 1992) (insufficient evidence to support punitive damages award).